No. Orig. 39

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Filed April 14, 1900.

BRIEF FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 265.

FREDERICK A. BELL, PLAINTIFF IN ERROR,

vs.

MARY G. BELL.

CHAS. B. WHEELER,

Counsel and Attorney for the Defendant in Error,

117 Erie County Savings Bank, Buffalo, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 265.

FREDERICK A. BELL, PLAINTIFF IN ERROR,

vs.

MARY G. BELL.

POINTS FOR MARY G. BELL, THE DEFENDANT IN ERROR, ON ARGUMENT OF WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK, TO REVIEW A JUDGMENT GRANTING A DECREE OF DIVORCE TO THE SAID MARY G. BELL FROM HER HUSBAND, FREDERICK A. BELL.

HISTORY OF THE CASE.

This action was begun by Mrs. Mary G. Bell against her husband, Frederick A. Bell, in the Supreme Court of the State of New York, by the personal service of the summons and complaint on him, on the 22d day of December, 1894. The complaint alleged as grounds of divorce the commission of acts of adultery by the defendant, Frederick A. Bell. (See complaint, p. 1 and 2.) The defendant answered. In his answer he denied the allegations of adultery on his part (p. 3); set up, by way of counterclaims, alleged adulteries by the plaintiff, his wife, and, as a further defense and bar to Mrs. Bell's action, pleaded the recovery by him of a decree of divorce from Mrs. Bell in the Court of Common Pleas of the State of Pennsylvania, on the 8th day of January, 1895 (p. 3). This Court will note the Pennsylvania divorce was not granted until about three weeks after Mrs. Bell had begun her own action. Mrs. Bell replied to the answer, denied the allegations of adultery on her part, and, touching the Pennsylvania divorce, alleged that no process from the Pennsylvania Court had ever been served on her; that she never had been, or was, a resident, or citizen, of the State of Pennsylvania; that said Court of Pennsylvania never had, or obtained, any jurisdiction over her, or the subject-matter of the action; and further alleged that Frederick A. Bell, the defend-

ant, never had been, or was, a resident of the State of Pennsylvania, but that all the times in question was and remained a resident and citizen of the State of New York (p. 5), and that any pretended proceedings in the Courts of Pennsylvania were taken by said Frederick A. Bell for the purpose of evading the laws of the State of New York, and were a fraud upon the rights of the plaintiff and upon the laws of the State of New York and of the State of Pennsylvania (p. 5).

The issues thus framed were referred upon stipulation and order to Mr. Spencer Clinton, a distinguished member of the Buffalo bar, to hear, try and determine.

This case was tried before the Referee, and on the 8th of June, 1895, the Referee made his decision and report, in and by which he directed judgment in favor of Mrs. Bell, dissolving the marriage relation, and directing the payment to her by her husband of the sum of $3,000 per annum, as alimony. (See Referee's report, p. 7.) This report of the Referee was confirmed by the order of the Court, and final judgments entered thereon. From that judgment the defendant, Mr. Bell, appealed to the Appellate Division of the Supreme Court, which Court affirmed the judgment. The opinion of Mr. Justice Follett, on that decision, will be found on pages 79 to 81 of the record. From the judgment of affirmance the defendant appealed to the Court of Appeals of the State of New York. The judgment was again affirmed, and upon the filing of the remittitur from that Court the judgment of the Court of Appeals was made the judgment of the Supreme Court.

The case is now brought before this Court on a writ of error, upon the claim of the plaintiff in error that the provisions of the Constitution of the United States requiring full faith and credit to be given the judicial proceedings of other States was violated by the refusal of the Courts of New York to recognize the validity of the Pennsylvania decree of divorce in favor of Mr. Bell. The validity of the Pennsylvania decree is the only question presented to this Court for review. (See assignments of error, pages 87 and 88 of Record.)

It is important to briefly set out the material facts disclosed by the evidence given on the trial.

FACTS.

The evidence in the case fully supports all the findings of fact made by the Referee, and his conclusions of law thereon. The evidence shows that the parties were married at Bloomington, Illinois, on the 24th day of January, 1878, at the residence of the plaintiff's parents (p. 15). After this marriage they lived a year or two in the City of Rochester (p. 15), and then moved to the City of Buffalo, where they continued to live together until about the 1st of September, 1882 (p. 15), when the plaintiff was

compelled to leave her husband's home in Buffalo under the following circumstances:

A few days prior to the final separation Mrs. Bell had occasion to go to Bloomington on a visit to her mother (pp. 18, 59, 63). She went simply for the purposes of a visit (p. 59). The plaintiff's counsel has asserted that Mrs. Bell on this occasion deserted her husband, although the plaintiff's own witness testified that she was simply "*going for a visit*" (p. 59). If we may be permitted to speak outside the record, we might say that while on this visit Mrs. Bell received a letter from her husband telling her he did not wish to see her again. After she had reached Bloomington her husband, the defendant, packed her wardrobe and other belongings in trunks, and moved these trunks and her piano out of the house into the stable (pp. 18, 59, 63). Within a few days Mrs. Bell returned to Buffalo with her mother, Mrs. Gridley, and went at once to her old home, and was greeted by her servants, "Mrs. Bell, we are glad you have come back before your things are all gone" (pp. 18, 59, 63).

She tried to gain admission to Mr. Bell's room (p. 59). The next day Mr. Bell left the house (p. 59), and stayed away for a week. Mrs. Bell, having thus been ejected from her own home, returned with her mother to Bloomington, and never lived with Mr. Bell afterwards. These facts are briefly found by the Referee in his report. (See finding IV., pp. 7, 8.)

This separation was not of Mrs. Bell's seeking. It was forced upon her. Notwithstanding the dissolute life of her husband, she continued to hope for a reunited married life. It appears that the plaintiff wrote her husband a number of letters, undoubtedly touching on the subject of a reunion, which, however, he did not answer until July, 1891. In a letter written to Mrs. Bell, he refers to the receipt of several letters from Mrs. Bell, tells her his love for her is "*dead and buried, and can never be revived*" (pp. 28, 29); tells her "*it is all over now, and we have only to make the best of what the future may have in store*" (p. 29), and suggests Mrs. Bell's taking steps for a divorce. Mrs. Bell wished no divorce, and took no steps to procure one. The defendant sent his counsel, Mr. Seymour, to Bloomington, to see Mrs. Bell personally, and urge her to get a divorce; and on July 17, 1893, wrote the plaintiff again, saying that since their separation he had been waiting for her to take some steps toward procuring a legal separation (pp. 27, 28), and adding, "*Of course, Mary, by this time, any hopes of any "reconciliation between us, as far as our being any more to "each other than we are at present, must by you have been aban-"doned.*" And in the same letter again tells her she must procure a divorce or he will "*take matters in his own hands.*"

By Section 831 of the New York Code of Civil Procedure it is provided that: "A husband or a wife is not competent to tes-"tify against the other upon the trial of an action," . . . . "founded upon an allegation of adultery, except to prove the "marriage, or disprove an allegation of adultery." Conse-

quently, Mrs. Bell was unable to testify to any of the circumstances attending their separation; and many matters of detail were necessarily omitted from the case; but the great, salient facts touching the separation are unchallenged and undisputed.

These facts had an important bearing not only on the question of the residence and domicile of Mrs. Bell during the years of separation, but also demonstrated that the pretended desertion for which the Pennsylvania divorce was granted had no facts to support it; and that Mr. Bell imposed on the Pennsylvania Court in claiming any such desertion ever took place. Not only did Mr. Bell deceive the Pennsylvania Court in that respect, but he also imposed on it when, in his petition for divorce, he alleged he was and had been a resident of Pennsylvania for a year (p. 38), as will presently appear.

Events not moving fast enough to suit Mr. Bell, he "*took matters in his own hands,*" and on April 5, 1894, verified and filed a petition for a divorce against this plaintiff in the Court of Common Pleas for Jefferson County, in the State of Pennsylvania. (See defendant's Exhibit 3, pp. 36, 37.) The grounds of the Pennsylvania action was the alleged desertion of Mr. Bell by Mrs. Bell, which we have already seen was absolutely false in fact.

In that action Mr. Bell alleged, and claimed, that he had been a resident of Pennsylvania for a "*year previously to filing this his petition of libel*" (p. 37). The allegation of such Pennsylvania residence was in fact utterly false, for it appears that on the 31st day of January, 1894, Mr. Bell, in connection with his sister, Katharine B. Lewis, signed, verified and filed in the office of the Surrogate of Erie County at Buffalo, New York, his petition for the probate of the last will and testament of Juliett Bell, deceased, their mother, in which petition it is expressly stated that the residence of Mr. Bell is the City of Buffalo (pp. 25, 26). Mr. Bell and Mrs. Lewis were named as executors of their mother's will, and in the oath of office taken and subscribed by them, both again swore that they "*are citizens of the United States, residents of City of Buffalo, in said County of Erie*" (p. 26). So that we have the sworn statement of both Mr. Bell and of his own sister, Mrs. Lewis, that Mr. Bell instead of being a resident of Pennsylvania was in fact a resident of Buffalo, New York. It is most remarkable that Mr. Bell and Mrs. Lewis, his sister, never discovered that the defendant was a resident of the State of Pennsylvania. It would have been difficult to have discovered such was the fact with the defendant living and keeping house next door to his sister in the City of Buffalo. These facts of the residence of Mr. Bell, the defendant, were not disputed or contradicted by a particle of evidence given by the defendant, and the referee found as a matter of fact that "*the defendant was not a bona fide resident of the State of Pennsylvania at the time of the beginning of the action to dissolve the marriage between the plaintiff and defendant, nor at the time of making of the judgment or decree therein.*" (See VIII., finding of referee, p. 8.)

Neither was Mrs. Bell a resident of the State of Pennsylvania. She had never resided there, and was never served with process there. This affirmatively appears by the testimony of Mr. Gridley, the brother of the plaintiff (p. 15), and it further appears from the proceedings in Pennsylvania, that she could not be found by the Sheriff (pp. 39, 40). Accordingly, it appears steps were taken for service of process by publication, and thereafter an order for publication of process was made. It was conceded by the defendant's counsel, on the trial, that no personal service was ever made upon Mrs. Bell in the Pennsylvania action (p. 34), but that whatever service was made was made by publication as upon a "*non-resident*" (p. 34).

It is not claimed that Mrs. Bell in any manner appeared in the Pennsylvania action, or in any way submitted herself to the jurisdiction of the Pennsylvania courts.

The only notice it is shown that Mrs. Bell had of the pendency of the Pennsylvania action is that on the 1st day of December, 1894, a printed copy of the subpœna and of a hearing by the examiner was mailed from Reynoldsville, Pa., to Mrs. Bell at Bloomington, Ill., at 1 P. M. That on reaching Bloomington, Mrs. Bell not being at Bloomington, the notices were forwarded from Bloomington to her at Brooklyn, where it appears they reached the post-office on December 4th, at 10 A. M., the very day set by the examiner in Pennsylvania for a hearing, and after the hour named for the hearing (p. 35). It appears, however, that owing to some delays the final decree in Pennsylvania was not taken until January 8, 1895 (p. 47). In the meantime, however, and on the 10th day of December, 1894, before any decree of divorce had been obtained in Pennsylvania, Mrs. Bell verified her complaint for a divorce in this action, and on the 22d day of December, 1894, also before any decree had been rendered in Pennsylvania, the summons and complaint were personally served on the defendant, Mr. Bell (p. 31).

Upon these facts, and upon the strength of an unbroken line of decisions, the Referee found the Pennsylvania decree of divorce had no binding force or effect, and constituted no defense to this action.

The allegations of adultery on the part of the defendant, Mr. Bell, were fully sustained by the evidence.

It appears that after the separation of the parties to this action, the defendant went to live at the "Genesee" Hotel in the City of Buffalo, where he had a suite of apartments, in which, however, there was only one bed. It was shown by the testimony that one of the defendant's acquaintances was one May Martin. That he was accustomed to visit her at the house where she lived; that in the month of April, 1890, Mr. Bell was indulging in a drinking spree in his rooms at the "Genesee," when this woman sought and obtained admission to his rooms; that on that occasion she remained living with the defendant in his rooms for one week. That at the end of the week, Mr. Bell left the rooms with the Martin woman, escorted her arm in arm to the elevator, and directed the chambermaid to change the

bedding of his bed. (See testimony of Annie Enright, pp. 19 to 22.)

It was further shown that in May, 1890, this same May Martin came to the Genesee Hotel, and took a room on the same floor with those occupied by Mr. Bell, and that on that occasion Mr. Bell entered her room late on a Saturday night, and remained there until noon of the following day. (See testimony of Annie Enright, pp. 29 to 34.) On other occasions May Martin visited his rooms and he hers (p. 36). It further appears that the Martin woman was not the only one with whom adultery was committed. During the same year, and at the same hotel, it was shown that another woman, whose name is unknown, was accustomed to come to the hotel and to share his room with him (p. 36).

The principal witness as to these transactions was Annie Enright, the chambermaid employed at the "Genesee," who had particular care of Mr. Bell's rooms, but her evidence was fully and completely corroborated by the testimony of Frank J. Doyle, who was "head-hall-man" at the Genesee, and who swore to answering a call from Mr. Bell's room, early one morning, and finding it occupied by Mr. Bell and a woman whom he did not know. He further testifies that on this occasion Mr. Bell was partially undressed, having on only his trousers and undershirt. (See testimony of Doyle, p. 16.) Doyle also gave testimony of the visits of women on other occasions to Mr. Bell's rooms.

Annie Enright was also fully corroborated by George D. Barrett, who was a bell-boy at the "Genesee," and responded to calls from Mr. Bell's rooms, and who testified to repeatedly seeing women in Mr. Bell's rooms, sometimes early in the morning, sometimes late at night, and who also testified that on one morning he saw in Mr. Bell's room a woman in bare arms, low neck, without the waist of her dress on, evidently not yet having completed her toilet. On these occasions it further appeared that Mr. Bell was on a spree, and the calls were for drinks, water and sandwiches. The same witness testifies to seeing one woman in his rooms who remained for a week at a time. (See Barrett's testimony, p. 23.)

Edward J. Futterer was another witness called by the plaintiff. He was an hotel attendant, who answered the bell call from Mr. Bell's rooms one morning and there found the room occupied by a woman (p. 24).

Mr. Bell, the defendant, did not take the stand to deny the testimony of the witnesses in question. It was competent for him, if innocent, to take the witness stand to deny the commission of adultery. He did not call other witnesses, or in any manner impeach or break the force and effect of this evidence. Their statements stand admitted, and the Referee could draw but one inference and conclusion from it, viz: the commission of adultery by the defendant as charged.

The commission of this adultery as a fact is embodied in the XI. findings of his report (p. 9).

The countercharge made by Mr. Bell against his wife was absolutely disproved, and the Referee so found. (See Referee's finding XV., p. 9.)

It is fair to remark in this connection that if Mr. Bell had had any just cause of complaint against his wife there was no necessity of his going to the Courts of Pennsylvania for a divorce.

The only error assigned is that the Courts of New York violated the provisions of the Constitution of the United States requiring "*full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State,*" in that they have refused to recognize the validity of the decree of divorce granted Mr. Bell against Mrs. Bell in Pennsylvania (p. 88).

The only proposition open for discussion is the validity of the Pennsylvania decree. Upon that question the counsel for the defendant in error submits the following points of law:

FIRST.

The Courts of Pennsylvania had no jurisdict on to grant the divorce given Mr. Bell and the Pennsylvania decree is, therefore, void, and was no defense to the action brought by Mrs. Bell against her husband in New York.

This proposition involves the whole case, and is based upon the facts found in the case, and affirmed by the courts of review on the various appeals which have been taken. We particularly call the attention of this Court to these findings of fact.

1st. That Mr. Bell at the time of instituting the Pennsylvania proceedings, and at the time of the granting of the decree, was not a *bona fide* resident of the State of Pennsylvania, but a resident of the State of New York. (See Referee's finding No. VIII. and VII., page 8, also Exhibit D, p. 26, in which Mr. Bell and his sister both state under oath that at times in question he was a resident of the City of Buffalo, N. Y.)

2d. That the plaintiff, Mrs. Bell, was not at the time of the commencement of this action, and never had been, a resident of the State of Pennsylvania. (See Referee's finding No. IV., pp. 7 and 8.)

3d. That at the time of the commencement of this action, and also at the time of the commencement of the action by the defendant in Pennsylvania, Mrs. Bell was a resident of the State of New York.

4th. That the alleged cause of action for which the Pennsylvania divorce was granted did not arise in Pennsylvania, but if any desertion ever took place (which, in fact, never did take place) it occurred in the State of New York, and not in Pennsylvania. (See petition, p. 37, and Referee's finding Nos. IV. and VI., pp. 7 and 8.)

5th. That Mrs. Bell was never personally served with any process in the Pennsylvania action, but the only service claimed was by publication of the subpœna. (See Pennsylvania decree pp. 38 to 48, and statement of defendant's counsel, p. 34, also finding of referee, No. VII. p. 8.)

6th. That Mrs. Bell did not appear in the Pennsylvania action either in person or by attorney. (See Referee's finding, VII., also record of Pennsylvania divorce.)

7th. That prior to the rendering of any decree in the Pennsylvania Courts this action for a divorce in New York State was begun against Mr. Bell by the plaintiff. (This action was begun December 22, 1894. The Pennsylvania decree was not granted until January 8, 1895. Referee's finding VI.)

8th. That the Pennsylvania divorce was procured on the pretended ground of the plaintiff's desertion of defendant, whereas, in truth and in fact there never was any such desertion by the plaintiff, but a desertion by Mr. Bell, the defendant.

9th. Mr. Bell imposed on the Pennsylvania Courts by claiming a year's residence in that State, when, in fact, he was a resident of New York.

10th. That a *pluries subpœna* was issued on the 14th of September, 1894, in the Pennsylvania action, requiring Mrs. Bell to show cause, on the second Monday (10th day) of December, 1894, why a divorce should not be granted. This subpœna, pursuant to an order of the Court, was published for four successive weeks, in the *Brookville Republican*, in the issues of October 17, 1894, October 20, 1894, October 31, 1894, and November 7, 1894, and on December 1, 1894. The *pluries subpœna* was enclosed in a post-paid envelope and addressed "Mrs. Mary G. Bell, Bloomington, Ill.," and deposited in the post-office at Reynoldsville, Pa. It was received at Bloomington, Ill., and forwarded by the post-office authorities to Mrs. Bell at Brooklyn, N. Y., where she received it December 4, 1894. The same day the examiner appointed to take evidence in the case mailed a notice to her at Bloomington, Ill., that he would attend to the duties of his appointment December 4, 1894, which notice Mrs. Bell received at Brooklyn, N. Y., December 4, 1894, the very day appointed to take the evidence. These notices actually received on December 4, 1894, constitute the only notice actually had by the plaintiff, Mrs. Bell, of the pendency of the Pennsylvania action.

11th. That the Pennsylvania divorce was granted for the alleged ground of the wife's desertion, whereas by the New York statutes the only grounds for an absolute divorce are those of adultery.

This Court must accept and cannot review the findings of fact of the Trial Court.

St. Louis vs. Rutz, 138 *U. S.*, 226.
Ruckle vs. Burnham, 153 *U. S.*, 216.
Laing vs. Rigney, 160 *U. S.*, 536.

These findings of fact involve the very jurisdiction of the Pennsylvania Court to entertain the action there brought by Mr. Bell, and are conclusive on this Court notwithstanding any recitals of the Pennsylvania decree, for nothing is better established than the proposition that:

"Neither the Constitutional provision that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, nor the Act of Congress passed in pursuance thereof prevents an inquiry into the jurisdiction of the Court by which a judgment offered in evidence was rendered."

Thompson vs. Whitman, 85 *U. S.*, 457.
Knowles vs. Gaslight and Coke Co., 86 *U. S.*, 61.
Reynolds vs. Stockton, 140 *U. S.*, 265.
Kilbourn vs. Thompson, 103 *U. S.*, 198.
Hill vs. Mendenhall, 88 *U. S.*, 454.
Hall vs. Lansing, 91 *U. S.*, 165.
Penoyer vs. Neff, 95 *U. S.*, 714.
Brooklyn vs. Insurance Co., 99 *U. S.*, 370.
Pana vs. Bowler, 107 *U. S.*, 545.
Kerr vs. Kerr, 41 *N. Y.*, 272.
Cross vs. Cross, 108 *N. Y.*, 628.
Rigney vs. Rigney, 127 *N. Y.*, 408.
Sewell vs. Sewell, 122 *Mass.*, 156.
Price vs. Schaeffer, 161 *Pa.*, 530.
People vs. Dowell, 25 *Mich.*, 247.
Vanfleet Collateral Attack, 388, 389.

II. It appearing, therefore, from the facts found that neither Mr. Bell nor Mrs. Bell were residents of the State of Pennsylvania, the Courts of Pennsylvania had no jurisdiction to grant any divorce whatever, and the divorce is therefore absolutely void.

This case does not present for consideration the question what effect and force should be given a divorce granted by the Courts of a sister State where the complainant is a *bona fide* resident of such State, where no personal service is made on the other party who is a non-resident. Such was the Atherton case recently argued before this Court.

This case only presents the simple question as to the force and effect of a decree of a sister State where neither husband nor wife are or were residents of the State granting the divorce; and where nothing but a substituted or constructive service of process was made on the defendant, and that service outside the boundaries of the State in which the divorce proceedings were instituted.

While there has been more or less lack of harmony in the decisions of the Courts of different States as to the force and effect of divorces procured in other States against absent defendants, there is, nevertheless, no conflict whatever over this proposition, stated in the language of the distinguished text writer, Mr. Schuler, as follows: "The Courts of one State are not bound to "recognize a judgment of divorce granted by the Courts of "another State, if, in fact, the parties were neither of them *bona* "*fide* residents of the latter State at the time of the divorce "suit; for to give the Courts of any State jurisdiction over the "marriage relation, one of the parties at least must have a "genuine domicile within its territory, and not a mere residence "for the purpose of the divorce. If the parties have neither of "them a domicile in the State, a divorce which the Courts of that "State assume to grant is absolutely nugatory, and may be so "treated in other States."

Schuler on "Husband and Wife," § 574.

In *Sewell vs. Sewell*, 122 *Mass.*, 156.

Mr. Justice Gray, in the opinion of the Court, said that: "Where a husband goes into another State, without acquiring a "domicile there, for the purpose of obtaining, and does fraudu- "lently obtain, a divorce for a cause which occurred in, but "which was not a cause of divorce by the law of Massachusetts, "a Court of that State has no jurisdiction, and its decree grant- "ing the divorce is entitled to no faith and credit in Massachu- "setts as a judicial proceeding, even if the decree recites facts "sufficient to give it jurisdiction."

In *Hoffman v. Hoffman*, 46 *N. Y.*, 30, the plaintiff brought an action for divorce on the ground of the defendant's adultery. The defendant plead, as a defense, a divorce obtained by him in Indiana. It appeared the defendant applied to a court in Indiana, and obtained a judgment, but when he applied it appeared both parties, in fact, resided in New York. The Indiana divorce was held void. Judge Peckham, speaking for the Court of Appeals, said: "It thus appears that this defendant ob-"tained this judgment in Indiana by fraud. By fraud upon the "laws of that State as well as of this. . . . It is impossible "to sustain this Indiana judgment without coming in conflict "with every decision of our own Courts touching this question." . . . . "It is the settled doctrine of this State that such "record is not conclusive as to the question of jurisdiction." . . . "The Constitution did not mean to confer a new power "or jurisdiction, but simply to regulate the effect of the ac-"knowledged jurisdiction over persons and things within the "State. (*Story's Com on Con; Mills v. Duryee*, 2 Am. L. Cases, "623, *note.*) The necessary effect of sustaining this decree would "be, to allow any other State substantially to make laws for "this State, to regulate not only our domestic relations of hus-"band and wife, but almost every other right.

"A Court has no more authority to assume jurisdiction over "a marriage contract than over any other subject, without due "service of process or the appearance of the party defendant."

In the case of *People vs. Dowell*, 25 *Mich.*, 247, the defendant was indicted and convicted of bigamy. He claimed as a defense a divorce obtained by his first wife on her application in the State of Indiana. It appeared that the first wife, in fact, lived in Michigan although claiming a residence in Indiana, and that the husband appeared by attorney in the Indiana proceeding, and admitted the wife's residence to be in Indiana. The Indiana divorce was held invalid. Judge Cooley said in his opinion: "*I understand the rule to be, that to give the Courts of any* "*State jurisdiction over the marriage relations between a hus-*"*band and his wife one of the parties at least must have a* "*domicile within that State. Some of the judicial decisions* "*make further requirements, but no Court has ever held* "*that any less could be demanded*" (p. 254).

Referring to the provision of the constitution that full faith and credit shall be given to use judicial proceedings of other States Judge Cooley pertinently remarks: "Its whole purpose "and aim was in the direction of justice, comity, and good "neighborhood between the States; and it would be most re-"markable if it could now be employed to bolster up a proceed-"ing where a Court of one State has interfered with a matter "which wholly pertains to the concerns of another State, and "relates to its citizens exclusively, which it is impertinent for "such Court in any manner to meddle with, and which justice, "as well as every principle of comity, requires such Court to let "alone. If the constitutional provision can be so employed,

"then I do not hesitate to say, that it is capable of accomplish-
"ing more evils than it had power to prevent; and that, too, in
"the very direction in which its good influences were anticipated.
"For the effect is to destroy interstate comity and good neigh-
"borhood by enabling one State to extend its laws and legal
"procedure into the domains of its neighbors, to subject the
"citizens of such neighbor to its control in their most important
"relations of life, and to introduce among them practices which
"their own laws regard in a very high degree vicious and de-
"moralizing."

He might have added that the marriage relations would in effect be regulated and governed not by the laws of the State of residence, but imperiled by the laws of that State of the Union which made divorces easiest and most convenient. The marriage relations would not be sustained and fostered by the most enlightened legislation of educated and thoughtful people, but would be at the peril of the legislation of States where the moral and social plane is the lowest.

Says Judge Cooley in his work on "Constitutional Limitations" (p. 401):

"If a party goes to a jurisdiction other than that of his domi-
"cile for the purpose of procuring a divorce, and has residence
"there for that purpose only, such residence is not *bona fide*,
"and does not confer upon the Courts of that State or County
"jurisdiction over the marriage relations, and any decree they
"may assume to make would be void as to the other party."

Citing:

Hanover vs. Turner, 14 *Mass.*, 227.
Greenlaw vs. Greenlaw, 12 *N. H.*, 200.
Kimball vs. Kimball, 13 *N. H.*, 225.
Bachelder vs. Bachelder, 14 *N. H.*, 380.
Payson vs. Payson, 34 *N. H.*, 518.
Hopkins vs. Hopkins, 35 *N. H.*, 474.

See also the cases of

Gregory vs. Gregory, 78 *Me.*, 187.

Holding that even the presence within its territory of the inhabitants of other States gives it no authority to grant a divorce and thus change their marriage status: also

Foss vs. Foss, 58 *N. H.*, 283.
Leith vs. Leith, 39 *N. H.*, 20.
Lane vs. Lane, 2 *Mass.*, 167.
Squire vs. Squire, 3 *Mass.*, 184.
Choate vs. Choate, 3 *Mass.*, 391.
Barber vs. Root, 10 *Mass.*, 260.
Kimball vs. Kimball, 63 *N. H.*, 598.
Dutcher vs. Dutcher, 39 *Wis.*, 658.

Even the Pennsylvania Statute was violated by the decree given Mr. Bell.

The statute of Pennsylvania under which the Court of that State assumed jurisdiction expressly provides that "no person "shall be entitled to a divorce from the bond of matrimony, by "virtue of this act, who is not a citizen of this State, and who "shall not have resided therein at least one whole year previous "to the filing of his or her petition or libel."

Pepper and Lewis "Digest of the Laws of Pa.," p. 1639.

It is evident, therefore, that Mr. Bell, the defendant, was guilty of an imposition on the laws of Pennsylvania, as well as a fraud on the laws of New York.

At the time of the preparation of these points this Court has still under advisement the case of *Atherton v. Atherton*, argued and submitted in January. If this Court in its final decision of that case should affirm the judgment of the New York Courts, the plaintiff in error here would hardly be expected to further argue against the validity of the divorce in favor of Mrs. Bell given her by the Supreme Court of New York.

If, on the other hand, this Court should reach a contrary decision in the Atherton case, and hold that the Kentucky divorce obtained by Mr. Atherton against his wife was a bar to her action in New York, such a conclusion would not justify a reversal of the decree of divorce in Mrs. Bell's favor in this case, because the facts on which jurisdiction depends in the two cases are entirely different.

In the Atherton case the husband was a bona-fide resident of Kentucky, he was born there, and always lived in that State. He took his wife to live in Kentucky after their marriage. He continued to reside in Kentucky after their separation, although the wife returned to New York. It was in Kentucky that the husband subsequently instituted his action for divorce against his wife, and there obtained his decree. So that in the Atherton case we have this fact which distinguishes it from this case. That Mr. Atherton was a *bona fide* resident of Kentucky all the time, and at one time at least Mrs. Atherton was also a resident of Kentucky, whereas in our case neither Mr. Bell or his wife, Mrs. Bell, ever had been residents of Pennsylvania. If the Supreme Court of the United States in deciding the Atherton case should hold that the Kentucky Courts had jurisdiction to grant a valid divorce to Mr. Atherton on the ground that it had the right to determine the marital status of its own citizens; such a decision would not in any manner sustain the Pennsylvania Court in awarding Mr. Bell a divorce where it affirmatively appears that neither he or Mrs. Bell were residents of that State.

If the Atherton case should be decided before this is argued, Counsel for Mrs. Bell will doubtless submit further suggestions as to its force and effect.

Wherever divorces granted by the Courts of other States upon substituted service of process have been sustained it has

been upon the theory that marriage was a *status*, and that e
State had the right to determine the status of its own citize
Whether that theory will be ultimately established or not i
immaterial so far as this case is concerned, except that
very statement of the proposition carries with it the cou
proposition that no State has the right to determine the *sta*
of citizens of another State, which is the very thing the Pe
sylvania Courts had assumed to do.

**Even had Mr. Bell been a bona fide resident of Penn
vania, the divorce obtained by him in that State wo
nevertheless, be void for want of jurisdiction.**

So far as this argument is concerned, Mrs. Bell's case mi
safely rest on the foregoing decisions, unanimously holding
where neither party to a divorce is a resident of the State gr
ing the decree, the Court has no jurisdiction whatever to en
tain the action.

A more interesting question would have been presented
review had the evidence and the finding of fact been that
Bell, at the time of instituting his proceedings in Pennsylva
was a *bona fide* resident of that State. The evidence and
finding of fact was, however, just the opposite, that Mr.
was not a *bona fide* citizen of Pennsylvania at that time,
was a resident of the State of New York.

We propose, however, for the guidance and informatio
this Court, to present for its consideration a line of author
collected from the United States Courts, and from the var
State Courts, showing that the better authorities hold that
Pennsylvania divorce would be void even had Mr. Bell be
resident of Pennsylvania.

*The Pennsylvania divorce would have been void for wa
jurisdiction to grant it, even had Mr. Bell been a bona
resident of that State, it appearing that Mrs. Bell, his
never was a resident of Pennsylvania, and was never per
ally served with process in that State.*

The United States Supreme Court decisions.

So far as we are aware, this Court has never passed on
identical question presented, but it has at the same time
down and enunciated general principles which we believe
trol, *all holding that the process of the Courts of one State
not run into another State, and summon parties there domi
to respond to the proceedings against them.*

One of the later and leading cases is that of

Pennoyer v. Neff, 95, *U. S.*, 714.

The Court held that a personal judgment is without any validity if it be rendered by a State Court in an action against a non-resident of the State served by publication of the summons, but upon whom no personal service of process within the State was made, and who did not appear.

Speaking of the force and effect of constructive or substituted service of process in lieu of personal service on defendants, this Court said: "Where the entire object of the action is to deter-"mine the personal rights and obligations of the defendants, "that is, where the suit is merely *in personam*, constructive "service in this form upon a non-resident is ineffectual for any "purpose."

"Process from the tribunals of one State cannot run into an-"other State, and summon parties there domiciled to leave its "territory and respond to proceedings against them. Publica-"tion of process or notice within the State where the tribunal "sits, cannot create any greater obligation on the non-resident "to appear. Process sent to him out of the State and process "published within it are equally unavailing in proceedings to "establish personal liability" (p. 727).

. . . . The Court adds that "In all cases brought "in the State and Federal Courts, where attempts have been "made under the act of Congress to give effect in one State to "personal judgments rendered in another State against non-"residents without service upon them, or upon substituted "service by publication, or in some other form, it has been held, "without exception, so far as we are aware, that such judg-"ments were without binding force, except as to property or "interests in property within the State to reach and effect which "was the object of the action in which the judgment was ren-"dered," and "which property was brought under control of the "Court in connection with the process against the person. The "proceeding in such cases, though in the form of a personal "action, has been uniformly treated where service was not ob-"tained, and the party did not voluntarily appear, as effectual "and binding merely as a proceeding *in rem*, and having no ob-"ligation beyond the disposition of the property, or some inter-"est therein" (pp. 730, 731).

. . . . "Since the adoption of the Fourteenth Amend-"ment to the Federal Constitution, the validity of such "judgments may be directly questioned, and their enforcement "in the State resisted on the ground that proceedings in a "Court of Justice to determine the personal rights and obliga-"tions of parties over whom the Court has no jurisdiction do "not constitute due process of law" (p. 733).

The Court added that it does not "mean to assert by anything "we have said that a State may not authorize proceedings to "determine the *status* of one of its citizens toward a non-"resident, which would be binding within the State though "made without service of process or personal notice to the "non-resident. The jurisdiction which every State possesses to "determine the civil status and capacities of all its inhabitants "involves authority to prescribe the conditions on which pro-"ceedings affecting them may be commenced and carried on "within its territory. The State, for example, has absolute "right to prescribe the conditions upon which the marriage re-"lation between its own citizens shall be created, and the causes "for which it may be dissolved. One of the parties guilty of "acts for which by the law of the State a dissolution may be "granted may have removed to a State where no dissolution is "permitted. The complaining party would, therefore, fail if a "divorce were sought in the State of the defendant, and if ap-"plication could not be made to the tribunals of the complain-"ant's domicile in such case, and proceedings be there instituted "without personal service of process, or personal notice to the "offending party the injured citizen would be without re-"dress."

The remarks of the learned justice in the foregoing case so far as the same relate to the jurisdiction of Courts to dissolve a marriage when one party to the suit is an absentee are clearly "*obiter*." He does not assume to speak either for himself or for the Court in that regard, but saves the question for the future consideration of the Court, intimating only that where the guilty party leaves the State of his domicile he ought not to defeat a divorce by evading personal service of process of the Court where the injured party lives, and the cause of action arose. The case certainly clearly intimates that the boundaries defining when and where substituted service may be deemed sufficient to support a divorce are very limited and circumscribed.

In *Knowles vs. Gaslight & Coke Co.*, 86 *U. S.*, 60, which was a case of a suit upon a judgment rendered by another State, in which it appeared by the record that personal service of process had been made on one of the parties; it was held that the defendant and judgment debtor might show in a suit on the judgment that no such service was in fact made. The Court said: "We do not mean to say that personal service is in all "cases necessary to enable a Court to acquire jurisdiction of the "person. Where the defendant resides in the State in which "the proceedings are had, service at his residence, and perhaps "other modes of constructive service may be authorized by the "laws of the State. *But in the case of non-residents, like that "under consideration, personal service cannot be dispensed with "unless the defendant voluntarily appear.*"

In *Insurance Co. vs. Bangs*, 103 *U. S.*, 435, this Court held that in all cases brought to enforce or cancel personal contracts,

or to recover damages for their violation, the law requires personal service of process upon the defendants or their voluntary appearance.

In *Hart vs. Sansom*, 110 *U. S.*, 154, Mr. Justice Gray, speaking for the Court, said. "Generally, if not universally, equity "jurisdiction is exercised *in personam*, and not *in rem*, and "depends upon the control of the Court over the parties by "reason of their presence or residence." It was accordingly held that upon a bill to remove a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, but operates *in personam*, and as against a person not a citizen or resident of the State in which it is rendered can only be supported by actual service of process within its jurisdiction, and that constructive service is insufficient.

See also:

Cooper vs. Newell, 173 *U. S.*, 555.
Goldy vs. Morning News, 156 *U. S.*, 518.
Thompson vs. Whitman, 85 *U. S.*, 457.

This Court has gone so far as to hold that when a defendant appears in an action in a State Court and responds to the complaint as filed, but takes no subsequent part in the litigation, and on those pleadings a judgment is rendered in no way responsive to them, he is not estopped by the judgment from setting up that fact, and the Constitution of the United States is not violated by the entry of a judgment in his favor on such an issue, raised in an action on the judgment brought in a Court of another State.

In *Cheever vs. Wilson*, 76 *U. S.*, 108, the wife having acquired a domicile in Indiana procured a divorce from her husband in the Courts of that State. The husband appeared in that action, and denied the allegations of the wife's bill, and on his part filed a cross bill. Upon the evidence the Indiana Court granted the divorce prayed for by the wife. The validity of the decree was subsequently attacked on the ground that the Court had no jurisdiction, but the Court held the Indiana divorce valid. It is to be noted that in that case the Indiana Court had jurisdiction of both parties, and after a contest between them made its findings.

In *Cheeley vs. Clayton*, 110 *U. S.*, 704, Mr. Justice Gray took occasion to say that the Courts of the State of the domicile of the parties have doubtless jurisdiction to decree a divorce in accordance with its laws, for a cause allowed by those laws, without regard to the place of marriage or to that of the commission of the offense for which the divorce is granted, and a divorce so granted is valid everywhere. . . . "If a wife is living apart from her husband without sufficient cause, his domicile is

in law her domicile, and in the absence of any proof of fraud or misrepresentation on his part a divorce obtained by him in the State of his domicile after reasonable notice to her, either by personal service, or by publication in accordance with its laws is valid, although she never in fact resided in that State.

Citing

Burlew vs. Shannon, 115 *Mass.*, 438.
Hunt vs. Hunt, 72 *N. Y.*, 218.

It will be noted that the opinion proceeds on the theory that both the plaintiff and defendant were domiciled in the State where the suit was brought, and that, therefore, the decree simply established the status of citizens of that State. The case does not hold that where the domiciles of the parties are in fact and in law separate and different that jurisdiction would in such case exist to make a valid decree.

The case of *Cheeley vs. Clayton*, 110 U. S., 704, cites the case of *Hunt vs. Hunt*, 72 *N. Y.*, 217, and appears to be in harmony with the doctrine there laid down that a citizen of a given State "owes it allegiance, and is under the force and authority of its "laws, and so long as he remains in that relation he cannot "throw off his subjection by the act of temporary or prolonged "absence from the State, he is still amenable to those laws, and "bound by their provisions as to substitute service of process."

If, however, the wife or husband never had a domicile in a State, or had in good faith and lawfully terminated a domicile in such State, their allegiance is not owed to the laws of such State, and the provisions for a substituted service of process can not bind or control such persons.

For further cases bearing on the question of want of jurisdiction without personal service as bearing on the constitutional questions involved see

Brooklyn vs. Ins. Co., 99 *U. S.*, 370.
Mohr vs. Manierre, 101 *U. S.*, 422.
St. Clair vs. Cox, 106 *U. S.*, 350.
Pana vs. Bowler, 107 *U. S.*, 545.
Smith vs. Woolfolk, 115 *U. S.*, 149.
Renaud vs. Abbott, 116 *U. S.*, 285.
Freeman vs. Anderson, 119 *U. S.*, 187.

The Law as recognized by the Courts of New York.

The Courts of the State of New York have uniformly refused to recognize the validity of divorces obtained in the Courts o

other States where the defendant has not been personally served with process within the State in which the decree was rendered.

Kerr vs. Kerr, 41 *N. Y.*, 272.
Kinear vs. Kinear, 45 *N. Y.*, 535.
Hoffman vs. Hoffman, 46 *N. Y.*, 30.
People vs. Baker, 76 *N. Y.*, 78.
O' Dea vs. O' Dea, 101 *N. Y.*, 23.
Jones vs. Jones, 108 *N. Y.*, 415.
Cross vs. Cross, 108 *N. Y.*, 628.
Rigney vs. Rigney, 127 *N. Y.*, 408.
Williams vs. Williams, 130 *N. Y.*, 193.
Atherton vs. Atherton, 155 *N. Y.*, 129.
Matter of Kimball, 155 *N. Y.*, 62.
Matter of De Garamo, 86 *Hun.*, 390.

The question has been presented to the Courts upon many and varied state of facts, but the Courts have held steadfastly to the doctrine that Courts of other States acquired no jurisdiction by virtue of a substituted service to determine the marriage status of citizens of New York even though the party instituting the divorce proceedings in another State were at the time a bona fide citizen of that State.

In *Kerr vs. Kerr*, 41 *N. Y.*, 272, a divorce was obtained in Indiana by the husband, in which he falsely alleged he was and had been for the required time a resident of that State. It further appeared that certain attorneys assumed to appear and answer for the wife, although she was not served with process, and had no knowledge of the pendency of the action. The Court held the Indiana Court had no jurisdiction, and the divorce void and invalid.

In *Kinear vs. Kinear*, 45 *N. Y.*, 535, the Court said that judgments of this character may be "impeached for want of jurisdiction and also for fraud. If it appear by the record that the "defendant was not served with process, and did not appear in "person, or by attorney, such judgment is void."

In *Hoffman vs. Hoffman*, 46 *N. Y.*, 30, the plaintiff brought an action for a divorce on the ground of adultery. The defendant plead a divorce obtained by him in Indiana. It appeared that the defendant applied to a Court in Indiana for a divorce and obtained a judgment, but when he applied it appeared both parties in fact resided in New York. The Court said, "It thus appears that this defendant obtained this judgment in Indiana by fraud. By fraud upon the laws of that State as well as of this." . . . "It is impossible to sustain this Indiana judgment without coming in conflict with every decision of our own courts touching this question."

(*Citing Kerr vs. Kerr*, 41 *N. Y.*, 272.)

In *People vs. Baker*, 76 *N. Y.*, 78, the defendant was convicted of bigamy.

It appeared that in 1871 the defendant married one Sallie West, in the State of Ohio. They came to New York to live, and in 1874, while she was still living, married one Eunice Nelson, at Auburn, N. Y. His first wife had instituted divorce proceedings and obtained a decree of divorce in Ohio. The defendant on the trial offered in evidence the record of the divorce obtained by said Sallie, in Ohio, wherein the record showed the proof of service by publication. There was no personal service on or appearance by the defendant. The question was presented as to the sufficiency of the divorce.

The Court held that in order to make a judgment of divorce, rendered by a Court of another State, valid in this State that Court must have "the parties within its jurisdiction," must have "jurisdiction of the subject matter and of the parties" who "must be within the jurisdiction of the Court."

The Court held the Ohio divorce no defence, that a Court of another State cannot adjudge the dissolution of the marital relations of a citizen of this State, domiciled and actually residing here during the pendency of the judicial proceedings in such State without a voluntary appearance on his part, although the marriage was solemnized in such State.

In the case of *O' Dea v. O' Dea*, 101 *N. Y.*, 23, it appeared that Mary O' Dea, the defendant, in 1844 resided in Toronto, Canada, but in that year married one "K.," at Lewiston, N. Y., and lived with him as his wife here until 1860, when she separated from "K." and returned to Toronto, where she continued to live until 1865. "K.," her husband, removed from New York State and became a resident of Ohio, where, in March, 1864, he commenced an action and obtained a divorce for desertion. A copy of the petition and summons issued were mailed the defendant and were received by her. She was present at the taking of the testimony, but took no part, personally or by counsel, and the decree of absolute divorce was granted.

The plaintiff afterwards married the defendant, and they lived together as husband and wife. When the plaintiff brought this action to annul the marriage, because the defendant had never been legally divorced from "K.," held that the Ohio Court acquired no jurisdiction over the defendant, and the decree as to her was inoperative and void.

In *Jones vs. Jones*, 108 *N. Y.*, 415, it appeared that the parties, being residents of the State of New York, married there in 1875. They lived there until 1878, when they separated and the wife went to the house of her parents, and in 1882 removed to Texas. She there began an action for divorce on ground of cruel and inhuman treatment, and a copy of her petition was personally served on the husband in New York City.

The husband appeared in Texas and defended on the merits and as to jurisdiction, but the wife prevailed and an absolute divorce was granted.

The husband, however, prosecuted an action for a divorce in this State, but the Court held that inasmuch as he had submitted himself to the jurisdiction of the Courts of Texas he was bound by the decree, but in discussing the case, say:

"It cannot be doubted, therefore, that the Texas Courts did not acquire jurisdiction of the defendant in the action by the service of a citation here, or that if the defendant has remained silent, taking no notice of the proceeding, no valid judgment could have been rendered against him."

See

Rigney vs. Rigney, 127 *N. Y.*, 498.

In *Cross vs. Cross*, 108 *N. Y.*, 628, a husband went to Illinois, acquired a residence there, and obtained a divorce there, while the wife continued to retain her domicile in New York. She was not served with process in Illinois, and did not appear in the action. It was held the divorce was void.

See also

Rigney vs. Rigney, 127 *N. Y.*, 408.

In *Williams vs. Williams*, 130 *N. Y.*, 193, it appeared that the parties were married in New York in 1879 and lived there until April, 1880, when the defendant refused to permit plaintiff to live with him and they separated. In 1882 the defendant removed to Minnesota. He procured a divorce in Minnesota on the ground of desertion. She was personally served out of that State with the summons and complaint in the divorce suit. It was held that such a divorce was void and that it was not error to exclude the judgment roll when offered in evidence. The Court then repeated what was said in *Jones vs. Jones* that "the "marriage relation is not a *res* within the State of the party "invoking the jurisdiction of a Court to dissolve it so as to "authorize the Court to bind the absent party, a citizen of "another jurisdiction, by substituted service or actual notice of "the proceedings given without the jurisdiction of the Court "where the proceeding is pending."

In *Atherton vs. Atherton*, 155 *N. Y.*, 129, the plaintiff and defendant were married in New York in 1888, and after their marriage went to Kentucky to live. In 1891 the plaintiff separated from her husband and came to New York to live, and in 1892 the defendant commenced an action for divorce in Kentucky, claiming the plaintiff had abandoned him. A decree was obtained. No personal service of process was made on her. The plaintiff then brought an action in New York for a divorce, and as a defense the Kentucky divorce was plead, but the Kentucky decree was held invalid.

In *matter of Kimball*, 155 *N. Y.*, 62, the question as to the validity of a foreign divorce arose on application for appoint-

ment of a representative of an estate. It appears that the m
riage took place in New York, but that the wife subsequen
went to Dakota and obtained a divorce in the Courts of t
State. The summons was personally served on the husband
New York, but our Court held that such service did not give
Courts of a sister State jurisdiction, and that the Dakota divo
was bad.

There is one exception to the general rule requiring perso
service on the defendant to confer jurisdiction, and that exc
tion is recognized and amplified in the important case of

Hunt vs. Hunt, 72 *N. Y.*, 217.

The opinion in that case is very carefully considered and f
quently cited. The Court there held that "in a suit for divor
"a valid judgment *in personam*, so as to effect a dissolution
"the marriage contract, which shall be prevalent everywhe
"may be rendered against a defendant not within the territor
"jurisdiction during the progress of the suit, if that be
"place of his citizenship and domicile, though process be ser
"upon him only in some method prescribed by the laws of t
"jurisdiction as a substitute for personal service, and thou
"he has not voluntarily appeared" (p. 241).

This is upon the theory that so long as a defendant remain
citizen of a given State "he owes it allegiance and is under
"force and authority of its laws; and so long as he remains
"that relation he cannot throw off his subjection by the act
"temporary or prolonged absence from the State. He is s
"amenable to those laws, and bound by their provisions as
"substituted service of process" (p. 239). When, howev
he once ceases to be a resident or citizen of a State he no lon
owes it that allegiance or is bound by the special provisions
its laws, and the proceedings of its Courts can no longer imp
or effect his rights in the absence of personal service within
territorial limits of the State.

It may be further stated that where both parties continue
be residents of a State a decree of divorce only effects the sta
of its own residents, and does not invade the jurisdiction
assume to determine the status of the citizens of a sister Stat

In the case of *People vs. Baker*, 76 *N. Y.*, 78, Chief Just
Folger delivered a most vigorous and instructive opinion,
which he discusses the leading decisions and the princip
involved. Addressing himself to the argument of "*statu*
and of "*proceeding in rem*," often advanced to sustain the ri
of Courts to entertain jurisdiction of actions for divorce,
learned Chief Justice sums up the case with these observatio

"We are not, therefore, satisfied with the doctrine that re
"the validity of such judicial proceedings and sovereign pow
"of a State to determine the *status* of its own citizens, and
"cause it cannot otherwise effectively establish it, asserts

"power to adjudge upon important rights without the party to "be affected, and without giving him the notice which is re- "quired by the principles of natural justice, he being all the "while beyond its jurisdiction. Besides, a just consideration of "what is a proceeding *in rem*, and of the effect of a judgment "therein, shows that the latter does not reach so far as is con- "tended for it. It is a proceeding *in rem* merely. The judg- "ment therein is not usually a ground of action *in personam* "in another jurisdiction, for as a proceeding *in personam*, or "as giving foundation for one, the Court gets no jurisdiction. "How, then, upon such basis, can the judgment be brought here "and made the foundation of an action against one personally. We submit that the doctrine accepted and enforced by the Courts of New York with the exception stated meets all the requirements, and goes as far as it is wise or prudent to go in sustaining foreign divorces.

The doctrine in Pennsylvania.

The decisions of the Courts of Pennsylvania are next considered, because it is the effect of a Pennsylvania decree which is now under consideration. It will be seen that the rule which is recognized in Pennsylvania is in substantial harmony with that which prevails in New York.

The Pennsylvania Courts hold that the injured party in the marriage relation must seek redress in the forum of the defendant, unless where such defendant has removed from what was before the domicile of both.

Calvin vs. Reed, 55 *Pa. St.*, 375.
Elder vs. Reel, 62 *Pa. St.*, 308.

In the case of *Elder vs. Reel*, 62 *Pa. St.*, 308, it appeared the parties were married in Pennsylvania, and that the husband left the wife and went to Tennessee, where, after living six years, he instituted proceedings for a divorce, and obtained a decree, having published his summons against his wife in the manner prescribed by the Tennessee statute. The wife was never out of the State of Pennsylvania, and at the time of the Tennessee divorce was living in Philadelphia. It was held that the Tennessee divorce was a nullity. Mr. Justice Sharswood, in his opinion, said: "That the injured party in the marriage relation must "seek redress in the *forum* of the defendant, unless where such "defendant has removed from what was before the common "domicile of both," and quotes, with approval, the opinion from *Calvin vs. Reed*, 5 *P. F. Smith*, 375, in which it is said: "In a "proceeding to dissolve a marriage the parties stand on a level of "right. When the injured party seeks a new domicile, and the "domiciles are actually different, there is no more reason why "the husband's new domicile should prevail over the wife's, than

"that her's should prevail over his. In this aspect justice "requires that neither should draw the other within the folds of "a foreign jurisdiction.

The case of *Calvin vs. Reed*, 55 *Penn.*, 375, is an important one as upholding the contention made by the defendant in error. The parties moved into Pennsylvania. The husband afterwards removed to Iowa and became a citizen of that State. He subsequently instituted proceedings for a divorce in Iowa, alleging the wilful and malicious desertion of his wife in Pennsylvania. Notice was given by publication. The Pennsylvania Court held the Iowa divorce void. Mr. Justice Agnew said: "Neither the "person nor the property of Mrs. Taylor being within the power "of the Iowa Courts, no extra-territorial effect can be imputed to "its judgments. . . . The law required their mutual consent "to establish the relation (marriage) from which the unity "arises, and the same law of right demands them to be viewed "in their separate natural condition when either proceeds "against the other to destroy this relation. It is the necessary "effect of their being opposite parties in the same proceeding. "Upon a dissolution of the marriage, therefore, each has a right "to be heard as a natural person. This sends us back to the "inquiry how far a State having the right to regulate the civil "*status* of one of the parties, may in so doing alter the *status* "of another over whom it never has had any power." . . . . "Clearly no State right to regulate the status of its own citizens "can justify this. The publication of the notice makes no dif"ference, for back of it lies the want of power of the distant "State to subject her to its jurisdiction. Nothing short of pos"session of the person before or at the time of the proceeding "can warrant this. Even in questions of property the *status* "must be within the State to subject it to jurisdiction, and "beyond the particular property so situated no right can be "affected by a foreign jurisdiction. On what principle of right "or of comity shall the decree of a distant tribunal, never "having acquired jurisdiction from domicile or otherwise over "her cut loose these claims, and disable Pennsylvania from "taking the property of the husband within its borders, to lift "the burden of support from the public shoulders, or from "rendering to the wife judicially that right which she has in her "husband's property and which he has neither carried away with "him nor defeated by his removal? To admit this greater right "of the foreign decree is to derogate from our own sovereignty, "and to withdraw from one of our own citizens the protection "due her. No correct principle of interstate law can demand "this."

The Massachusetts decisions.

In the recent case of *Cummington vs. Belchertown*, 149 *Mass.*, 223, it appeared that parties were married in Massachusetts and

lived together for a period, when the wife was declared insane and committed to an asylum. The husband left Massachusetts and moved to New York, where he procured a decree anulling his marriage, on the ground that it was induced by fraud. Substituted service was made on the wife in Massachusetts. The decree thus procured was set up and relied on in an action by the town for the support of the wife, but the Massachusetts Supreme Court refused to recognize such a decree "upon the "ground . . . that the decree of the New York Court at- "tempts to annul a marriage in Massachusetts, between Massa- "chusetts citizens, and thus affect the legal status of the "woman who has remained domiciled in Massachusetts, and "has never been within the jurisdiction of the New York Court, "and deprive her of the rights acquired by her marriage, and "especially because it declares the marriage void for a reason "on account of which, by the Massachusetts law, it cannot be "avoided. We are of the opinion it should not be enforced "here, and that no principle of interstate comity requires we "should give it effect."

The case of *Harteau vs. Harteau*, 14 *Pick.*, 181, is an important one as further illustrating the attitude of the Massachusetts Courts. In that case the parties were married in Massachusetts, and then removed to the State of New York and took up their residence there. The wife subsequently returned to Massachusetts on account of the husband's desertion and cruel neglect, took up her abode and applied for a divorce in Massachusetts, the husband remaining in New York. The Court dismissed her libel, the Court being of the opinion that both parties having renounced their domicile in Massachusetts, the return of the wife to Massachusetts would not give the Courts of that State jurisdiction over the husband.

The Massachusetts Courts have uniformly refused to recognize the validity of divorces granted by other States where a party has gone into another State without acquiring a domicile there for the purpose of obtaining, and does obtain, a divorce for a cause which occurred in but which was not a cause of divorce by the law of Massachusetts, on the ground that the Court of that State had no jurisdiction, and its decree granting the divorce is entitled to no faith and credit in Massachusetts as a judicial proceeding, even if the decree recites facts sufficient to give it jurisdiction.

Sewall vs. Sewall, 122 *Mass.*, 156.
Hanore vs. Turner, 14 *Mass.*, 227.
Chace vs. Chace, 6 *Gray*, 157.
Lyon vs. Lyon, 2 *Gray*, 368.

On the other hand the Massachusetts Courts have held in a number of cases that if it did not appear that the wife's separation from her husband was for justifiable cause then the domicile of the wife followed that of her husband, and for the

purposes of a divorce the other State will be deemed to have jurisdiction of both parties, and a divorce granted upon substituted service good.

Locker vs. Gerald, 157 *Mass.*, 45.
Burlen vs. Shannon, 115 *Mass.*, 438.
Hood vs. Hood, 11 *Allen*, 196.
Greene vs. Greene, 11 *Pick*, 410.

In other words, the Massachusetts Courts appear to recognize the proposition that in order to render a decree of divorce of a foreign State valid and give it jurisdiction where resort is had to a substituted or constructive service of process the domicile of both parties must be in that State, and that a sister State has no power or jurisdiction to determine the marital status of a *bona fide* citizen of Massachusetts by reason of constructive or substituted service of process.

In this connection it will be proper to add, that Massachusetts Courts also recognize the rule that a wife may obtain a domicile separate and apart from her husband for justifiable cause.

Burlen vs. Shannon, 115 *Mass.*, 438.
Shaw vs. Shaw, 98 *Mass.*, 160.

Vermont Decision.

In *Brosser vs. Warner*, 47 *Vt.*, 667, parties married in New York, and lived there many years as husband and wife, but subsequently went to Shelbourne, Vt., where the husband deserted his wife. She returned to New York and subsequently began an action and obtained a divorce from her husband in the Supreme Court of New York. Notice of the pendency of the action was given by publication and mailing of the summons and complaint to the husband. The husband did not appear, and the divorce was granted. The Vermont Court held that the New York Court obtained no jurisdiction of the husband, and that the decree providing for the payment of alimony was not binding on him in Vermont, and semble that the decree of divorce was void.

New Jersey.

In *Dougherty vs. Dougherty*, 28 *N. J. Eq.*, 581, the parties were married in New Jersey. After a month the husband went to the State of Illinois, where he continuously resided, the wife on the other hand continued to reside in New Jersey. The husband began an action in Illinois for divorce. The wife never resided in Illinois, was never served with pro-

cess there. No notice of the pendency of that action was given her, but the record showed she was served by publication. This Illinois divorce was set up as a defense to an action brought by the wife against her husband, for a divorce, in the New Jersey Courts. The Chief Justice held that while Illinois had the right to establish the *status* of its own citizens it had no right to impose its policy beyond the limits of its own territory, saying:

"All the claim which such an adjudication has to foreign "recognition, in my opinion, rests on the ground of comity. "It is not a judgment such as is entitled to recognition and "enforcement in other States by force of the Act of Congress "and the Constitution of the United States."

In *Fowler vs. Fowler*, 42 *N. J. Eq.*, 152, it appeared that in 1882 the wife removed from the State of New Jersey to Michigan, where, after a residence of a year, she obtained a divorce from her husband. He was served by publication. The wife returned to New Jersey, remarried and immediately returned to Michigan. On application of the husband for a divorce in New Jersey it was held the Michigan decree was a nullity as to him.

Michigan Decisions.

The attention of this Court has already been called to the case of the *People vs. Dowell*, 25 *Mich.*, 247, where a husband was indicted and convicted for bigamy, in making a second marriage after his first wife had obtained an Indiana divorce. It appeared the first wife lived in Michigan, although claiming a residence in Indiana, where she took proceedings, and obtained a decree divorcing her from her husband. It further appeared that the husband appeared in the Indiana action, and admitted the residence of the wife to be in Indiana, and yet the Michigan Supreme Court held the Indiana divorce absolutely void and no defense to the prosecution of the husband for bigamy in making a subsequent marriage.

The case was followed by the later decision, *Wright vs. Wright*, 24 *Mich.*, 180, upon almost identical facts, saving that there was no appearance of the defendant in the Indiana proceedings.

The Court held "*the Indiana Court to have been wholly without jurisdiction and the divorce, therefore, invalid.*"

Wisconsin.

In *Cook vs. Cook*, 56 *Wisconsin*, 195, the parties were married in New York, and went to Wisconsin to live. In 1875 the husband left the State of Wisconsin and went to Michigan, and in

1880 began an action for divorce in Michigan, alleging his wife had deserted him. His wife was not a resident of Michigan, but continued to reside in Wisconsin. Service was made on the wife by publication according to the laws of Michigan; a divorce was granted.

The Wisconsin Court held such a decree no bar to the action of the wife in Wisconsin. The opinion treats the marriage relation as a *status*, and while conceding each State has the power to absolutely fix and regulate such status as to each and all of its own citizens, asserts that "it logically follows that no one "State has the power to fix, regulate or control such status as "to citizens of any other State."

To the same effect is the case of *Shafer vs. Bushnell*, 24 *Wis.*, 376.

Minnesota.

The same rule prevails in Minnesota.

State vs. Armington, 25 *Minn.*, 29.

Illinois.

In Illinois it is held that a divorce granted by a Court of another State to a party who went to such State for the purpose of procuring such divorce and of returning after it has been granted, when granted and procured upon a substituted service of process, is void for want of jurisdiction.

Dunham vs. Dunham, 162 *Ill.*, 52.

Other cases hold that in making jurisdiction appear by fraud will defeat a divorce thus obtained.

Edson vs. Edson, 120 *Mass.*, 590.
Scanlon vs. Scanlon, 41 *Ill.*, 449.

English Doctrine.

The English Courts lay down the doctrine that the first essential for the validity of a foreign decree of divorce is that it should be pronounced by a court of competent jurisdiction between parties who are *bona fide* subjects of that jurisprudence.

No nation will admit that its domiciled subjects may lawfully resort to another country for the purposes of evading the laws under which they live. When they return to the country of their domicile, bringing back a foreign judgment so obtained, the

tribunals of the domicile are entitled to reject it, and bound to reject it if it be an evasion of their own laws and policy.

See opinion of Lord Westbury in

Shaw vs. Gould, *L. R. H. L., Cas.*, 55, 18 *L. T. N. S.* 833, decided in 1868.
Dolphin vs. Robins, 7 *H. L. Cas.*, 390.
Pitt vs. Pitt, 12 *Weekly Rep.*, 1089.

In *Rex vs. Lolley*, *Russ & R. C. C.*, 237, 2 *Clark & F.*, 567, it was held that an English marriage could not be dissolved by any foreign court on grounds for which it could not be dissolved in England. Lolley and wife had been married in England and were domiciled English subjects. A divorce was obtained in Scotland, where they were temporarily residing, and Lolley returned to England and remarried in England. He was convicted of bigamy.

In *McCarthy vs. De Caix*, 2 *Russ & M.*, 614, 2 *Clark & F.*, 568. A Dane and an English woman had been married in England, and then returned to Denmark, in which country they were divorced, and it was held the divorce was invalid in England.

To the same effect was the case of *Conway vs. Beasley*, 5 *Eng. Eccl. Rep.*, 242.

In *Shaw vs. Att'y Gen'l*, *L. R.*, 2 *Prob. Div.*, 156, a woman whose domicile was originally English, and who married in England, came to Iowa, where she resided two and a half years, when she obtained a divorce from her husband, who had never abandoned his domicile in England. The Iowa divorce was held invalid in England.

Pennsylvania decree obtained by fraud

The decree of divorce obtained by Mr. Bell in Pennsylvania was obtained by fraud in an attempt to evade the laws of the State of New York, and making a Pennsylvania residence to appear, when, in fact, he continued a resident of New York. (See findings of Court previously cited.)

Under such circumstances it has been repeatedly held that neither principles of comity nor the provisions of the constitution required the recognition of the validity of a judgment so obtained.

Sewell vs. Sewell, 122 *Mass.*, 156.
Edson vs. Edson, 120 *Mass.*, 590.
Kerr vs. Kerr, 41 *N. Y.*, 274.
Hoffman vs. Hoffman, 46 *N. Y.*, 30.
Dunham vs. Dunham, 162 *Ill.*, 52.
Scanlon vs. Scanlon, 41 *Ill.*, 449.

Some general observations.

From the decisions cited some general deductions may be made.

It may be safely said that the constitution did not mean to confer a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the State.

That where neither the husband nor the wife are *bona fide* residents of a State it has been without exception held that no jurisdiction can be obtained to grant a divorce dissolving the marriage between them, and such a decree is absolutely void.

That in Massachusetts, Vermont, New York, Pennsylvania, New Jersey, Michigan, Wisconsin and Minnesota at least, if not in many other States, the Courts hold with substantial unanimity that a divorce granted by another State is absolutely void where it appears that the defendant was not at the time a resident of such State, and was never personally served with process within its territorial limits, and never appeared in the action although the plaintiff in such an action may have been a *bona fide* resident of the State.

That in cases in those States where a substituted service of process has been held sufficient to give jurisdiction the defendant has been either actually or constructively a resident of the State granting the divorce, and by reason of such actual or constructive domicile owing allegiance to the laws of that State and its provisions touching substituted service. Within the bounds stated, the Courts kept within sound and safe principles of jurisprudence. Substituted in place of personal service of process cannot, however, be given greater force or made applicable to a wider class of cases for the purpose of sustaining the plea of jurisdiction without danger to the welfare of our people, or without violating the underlying principles of jurisprudence.

The argument of "*status*," so commonly advanced to sustain divorces granted without personal service, wholly fails unless both parties happen to be residents of the State assuming jurisdiction. It fails because no State has a right to determine the status of citizens of another State. It should fail also for the reason that marriage is more than a mere "*status*." Marriage also involves contract rights, obligations and responsibilities, and it has been held over and over again that substituted service is unavailing in proceedings to establish or destroy personal liability.

Pennoyer vs. Neff, 95 *U. S.*, 714.
People vs. Baker, 76 *N. Y.*, 78.

A decree dissolving a marriage operates of necessity *in personam* if it is to have any validity at all. The wife, by virtue of the marriage, has the right of maintenance and support by her husband. She is entitled to dower in his lands, and if

the husband dies, intestate to a share in the distribution of his personal estate. In addition to her property rights, the wife is entitled to the society and protection of her husband, to participate in the fostering care and enjoyment of their children, and to enjoy many other rights springing from the marriage relation. How, then, can these rights be destroyed, wiped out of existence by a decree of a Court without the decree operating *in personam* upon her. Is it possible that where a Court of another State may not render a personal judgment on a money demand against one not personally served with process within its jurisdiction it may destroy property and personal rights springing from the marriage contract simply, by a substituted service? Are dollars and cents more sacred than the marriage relation which lies at the very foundation of society and civilization? There can be no sympathy with a logic which leads to such absurd conclusions.

These considerations we respectfully submit are a complete answer to the argument of "*status*" as a plea for the validity of exparte divorces procured in other States.

If the framers of our constitution had given to Congress the power to pass uniform laws regulating the granting of divorces, and conferred upon the United States Courts original jurisdiction to entertain suits for that purpose, the confusion and scandal which disgraces so much of State legislation and judicial decision would never exist. It remains, however, for this Court, by its considerate judgment, to settle forever many of the vexed questions which have disturbed eminent jurists. No more propitious time exists than the present, when public conscience has been aroused against the too common practice of seeking in other States relief from marriage ties and obligations for causes which the sober judgment and wise policy of the State of the real domicile of the parties have declared insufficient to warrant a divorce.

The exception taken by the counsel for Mr. Bell, and appearing on pages 76 and 77 of the record, was not well taken.

The counsel for the plaintiff in error has not, in his assignment of errors, specified the exclusion of Mr. Bell's evidence as a ground of reversal. Under subdivision 4 of Rule 21 the counsel cannot be heard upon this question.

None of the various Courts having this case under consideration have been asked to reverse the judgment upon the refusal of the Referee to permit Mr. Bell to testify as offered.

In order, however, that the Court may understand how the ruling came to be made, we briefly state:

The evidence had been closed, counsel for both parties had summed up the case, and were ready to submit it to the Referee for his decision, when counsel for Mr. Bell asked permission to

reopen the defendant's case for the purpose of calling Mr. Bel as a witness, and "to show by him that he did not read the "petition for the probate of his mother's will, signed by him and "his sister" . . . "and that he did not know that it contained "a reference to his own residence," referring, of course, to the petition found on pages 25 and 26 of the record in which Mr Bell had given his residence as Buffalo, N. Y., and verified the same, and later in the oath of office as executor swore that he was a resident of the City of Buffalo in the County of Erie; and without which oath under the Statutes of New York he would have not have been entitled to letters testamentary on his mother's will.

The counsel for Mrs. Bell objected to the defendant reopening his case, on the ground it was too late to do so, and also "on the "ground that under the provisions of the code the defendant "would not be a competent witness."

The Referee refused to reopen the case because he did not think the testimony of any importance, and also "*on the ground that the testimony included in the offer is incompetent.*"

The Court will note that the defendant's offer was not to prove generally that Mr. Bell's residence was in fact in Pennsylvania at the time in question, but to explain his sworn statement to the contrary. It was not proposed to call any witness but Mr Bell, the defendant, in the action, and that the objection of plaintiff's counsel was to Mr. Bell's own competency as a witness on the point. This objection to his competency was well taken, and the Referee so ruled.

Section 831 of the New York Code of Civil Procedure provides: "When Husband and Wife not Competent Witnesses— "when Competent.—A husband or a wife is not competent to "testify against the other upon the trial of an action, or the "hearing upon the merits of a special proceeding founded upon "an allegation of adultery, except to prove the marriage, or "disprove the allegation of adultery." . . . . It will thus be seen that the ruling of the Referee was right, and Mr. Bell could not testify as a witness to the matters in question. The United States Supreme Court will take judicial notice of the laws and judicial decisions of the several States.

Cheever vs. Wilson, 76 *U. S.*, 121.
Pennington vs. Gibson, 57 *U. S.*, 80.

The judgment of the New York Court should be affirmed and the Writ of Error dismissed.

CHAS. B. WHEELER,

Counsel and Attorney for the Defendant in Error,
117 Erie County Savings Bank, Buffalo, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 265.

FREDERICK A. BELL, PLAINTIFF IN ERROR,

vs.

MARY G. BELL, DEFENDANT IN ERROR.

SUPPLEMENTARY POINTS.

We are advised that Counsel for the plaintiff in error will contend on the argument of this case that, inasmuch as the Pennsylvania Court entertained Mr. Bell's application for divorce upon his representation that he was a citizen of that State, and has awarded to him a divorce, that the New York Courts and this Court are conclusively bound to assume that Mr. Bell was in fact, a resident of Pennsylvania, and cannot inquire whether in truth and in fact he was such resident or not.

This contention is not the law, and the defendant in error submits some supplementary points in answer, although the cases already cited fully dispose of the proposition.

A regrouping of the cases as they bear on this particular point may be, however, of assistance to this Court. We, therefore, make the following points:

FIRST.

The recitals of facts in a decree may be contradicted as to the facts necessary to give the Court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.

Thompson v. Whitman, 85 *U. S.*, 457.
Knowles v. Gaslight and Coke Co., 86 *U. S.*, 61.

The principle has been applied repeatedly to cases of divorce, and it has been held over and over that it is competent to show

that a decree of divorce granted by a Court of another State, although appearing on its face to be valid is in fact void, because the libellant fraudulently, and in evasion of the law of his domicile, procured that Court to exercise jurisdiction over the case. That recital of the residence of a libellant in a decree of divorce obtained on substituted service sufficient to give the Court of such state apparent jurisdiction entitle it to no faith and credit, if as matter of fact the jurisdictional facts do not exist.

Sewell v. Sewell, 122 *Mass.*, 156 (*s. c.* 23 *Amer. Rep.*, 299).
Shannon v. Shannon, 4 *Allen* (*Mass.*), 134.
Leith v. Leith, 39 *N. H.*, 20.
Gregory v. Gregory, 78 *Me.* 187 (*s. c.* 57 *Amer. Rep.*, 792).
Hoffman v. Hoffman, 46 *N. Y.*, 30.
Cross v. Cross, 108 *N. Y.*, 628.
Kerr v. Kerr, 41 *N. Y.*, 272.
People v. Dowell, 25 *Mich.*, 247 (*s. c.* 22 *Amer. Rep.*, 260).
Reed v. Reed, 52 *Mich.*, 121.
Chaney v. Bryan, 83 *Tenn.*, 589.

One Court cannot by a simple *ipse dixit* compel other Courts to yield jurisdiction. If a recital that Mr. Bell was a resident of Pennsylvania is to be conclusive, then a recital that Mrs. Bell was also a resident of Pennsylvania would be also conclusive, or any other alleged fact the Court might see fit to set out irrespective of the fact and the truth.

The counsel for Mr. Bell cited in the Courts below, as sustaining his contention that we cannot question Mr. Bell's residence, the case of *Kinnier v. Kinnier*, 45 *N. Y.*, 535. That case, however, was one where the defendant appeared in the action, and by answer submitted herself to the jurisdiction of the Court, and litigated the question of residence of the plaintiff, and the Court decided adversely to the contestion, and when that decree was attacked collectively, the Court properly held that that finding, where all parties were subject to the jurisdiction of the Court, was final. A very different question than that presented where no appearance is made.

We also beg to call this Court's attention to some additional authorities on the following proposition, already discussed on pages 10 to 13 of the principal brief, to wit:

SECOND.

Where a resident of a State procures a divorce in another State by default upon constructive service, such divorce is void.

Van Vliet on Collateral Attack, §649.
Sewell v. Sewell, 122 *Mass.*, 156 (23 *Am. Rep.*, 299).

Hanover v. Turner, 14 *Mass.*, 227 (*s. c.* 7 *Am. Dec.*, 203).
Adams v. Adams, 154 *Mass.*, 297.
Hoffman v. Hoffman, 46 *N. Y.*, 30.
Gregory v. Gregory, 78 *Me.*, 187 (*s. c.* 57 *Am. Rep.*, 792).
Wright v. Wright, 24 *Mich.*, 180.
Reed v. Reed, 52 *Mich.*, 121.
Leith v. Leith, 39 *N. H.*, 20.
Letowich v. Letowich, 19 *Kans.*, 451 (27 *Am. Rep.*, 145).
Watkins v. Watkins, 125 *Ind.*, 163.
Neff v. Beauchamp, 74 *Iowa*, 92.
Gellys v. Gellys, 71 *Tenn.*, 260 (*s. c.* 31 *Am. Rep.*, 637).
Smith v. Maxwell, 19 *Neb.*, 706.

There are no cases to the contrary.

In this connection we call this Court's attention to the opinion of the Referee, who tried the case, in which he said:

"The defendant claimed a residence in Pennsylvania, but "such residence could have been but nominal, as he at the same "time claimed to be a resident of this State, in proceedings in a "Surrogate's Court here. No evidence was offered to show that "the defendant actually changed his domicile from this State "to that of Pennsylvania." Page 10 of Record.

Also to the opinion of Mr. Justice Follett, who delivered the opinion of the Appellate Division on appeal to that Court, in which he says: "The evidence is ample to sustain the finding of "the Referee that the defendant in this action was not a resident "or citizen of Pennsylvania, but went there solely for the pur-"pose of instituting and prosecuting his suit for a divorce." (Record, page 81.)

The writ should be dismissed.

CHAS. B. WHEELER,
Counsel for Defendant in Error.
BUFFALO, N. Y.

No. 265. 39
Reply Br. of Wheeler for D.
Office Supreme Court U.S.
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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

O. T. No. 265.

Filed April 19, 1900.

FREDERICK A. BELL, PLAINTIFF IN ERROR,

versus

MARY G. BELL, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR IN REPLY TO BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

The counsel for the defendant in error begs to submit the following for the consideration of this Court in reply to matter set forth in the brief filed for the plaintiff in error; although most of the matter has been already set out in points for defendant previously filed.

FIRST.

On pages 6, 7, 8, 9 and 10 of the brief of opposing counsel, he has made an effort to show that the *exparte* divorce obtained by Mr. Bell in Pennsylvania was sustained by the merits of the case, and that Mrs. Bell did in fact desert Mr. Bell.

What evidence was given before the examiner in the Pennsylvania proceedings does not appear. For some reason counsel for Mr. Bell did not see fit to introduce with the certified copy of the Pennsylvania decree the evidence taken in that action. As a complete answer to the counsel's contention, we beg to say that the circumstances attending the separation of Mr. and Mrs. Bell were not in issue in this action. They only came up incidentally and from the evidence given the Referee found:

"In August, 1882, the plaintiff went to Bloomington, Ill., *on "a visit to her mother.* In her absence the defendant packed "up her wearing apparel and other property in trunks, and "had them removed to the stable preparatory to sending them to "the plaintiff at Bloomington. In September the plaintiff, "accompanied by her mother, returned to the defendant's house, "stayed three or four days and then left, accompanied by her "mother, for Bloomington, Ill."

See Referee's finding IV. on page 7 of Record.

There was no evidence to dispute these facts. Mr. Bell deliberately put his wife out of his house. He had not the courage or manhood to arrange for a mutual and amiable separation, but when his wife was away on a visit to her mother, put all her things out of his house into the stable, including even her piano. (See Record, page 59.)

When Mrs. Bell learned of this conduct on the part of her husband she at once returned with her mother, and was greeted by Maggie Cashian, the servant, with the exclamation, "Mrs. "Bell, we are glad you have come back before your things are "gone." (Page 59.)

This Maggie Cashian testified, she went to Pennsylvania to testify for Mr. Bell in his Pennsylvania proceeding. She says: I was sworn and testified "at Mr. Bell's request. Mr. Bell was "present; Mr. Seymour was present; they asked me nothing "about packing up Mrs. Bell's things." (Page 59.)

No, indeed! Mr. Bell and his counsel were very careful to conceal the real circumstances, showing that when Mrs. Bell finally left her husband's house, she had heartlessly and with insult practically been put out of his home.

Finding that her husband had repudiated her, what did Mrs. Bell do? She endeavored to see Mr. Bell. She sought an explanation of his conduct. He had none to give; but slunk out of the house the next morning with a guilty conscience, afraid to face his injured wife. (Page 59.)

Having been practically ejected from her husband's home, having been denied any satisfaction, Mrs. Bell concluded to return with her mother to Bloomington. She told her servants she was going. She is a lady. Of course, they knew she could not return to her husband's roof after he had done what he did. And yet the counsel for the plaintiff in error has the hardihood to assert that Mrs. Bell deserted her husband.

Let us look a bit further. It seems that Mrs. Bell wrote Mr. Bell a number of letters. These letters are not in evidence, because they were in Mr. Bell's possession, and he did not see fit to produce them. He acknowledged, however, that they had been received, and something of their contents may be inferred from one of Mr. Bell's letters to her. In his letter of July 5, 1891, Mr. Bell said:

"Mary, I have yours of the first inst., and think, perhaps, in "justice to you, as well as myself, I should reply. I have also "received the several letters you have heretofore written me, "but have not answered them, because I could see no good that "could come to either of us by so doing; with me it only brings "up unpleasant memories of the past and *associations that I "have striven to forget ever existed, and which, Mary, can "never be renewed. My love for you is a thing of the past, "dead and buried, and can never be revived*," etc. (Page 28.)

Again, two years later in a letter written in July, 1893, Mr. Bell tells his wife, "Of course, Mary, by this time any hopes

"of any reconciliation between us, as our being any more to "each other than we are at present, must by you have been "abandoned." (Page 29.)

He put her out of his home, and writes her twice that he will not listen to anything looking toward a reunited married life; asks her to get a divorce from him, and, because she does not accede to that demand, files a bill against his wife for alleged desertion. On the hearing in the Pennsylvania Court he suppresses the essential facts, and then asserts that this *ex parte* Pennsylvania decree was granted on the merits.

The evidence is all the other way. The findings of the Referee are all the other way.

It is true that all this has nothing to do with the question now before this Court, but counsel for Mrs. Bell could not permit the statements made in the brief of counsel for Mr. Bell on these matters to go uncontradicted.

SECOND.

As to Mr. Bell's domicile.

Counsel for the plaintiff in error devotes not a small portion of his brief in an effort to avoid the force and effect of the Referee's finding that Mr. Bell was not a *bona fide resident* of Pennsylvania, as set out in his finding of fact VIII., page 8.

I regret to observe that counsel for Mr. Bell without any justification has even seen fit to make a personal attack on the Referee who was selected by himself, and whose standing and integrity as an upright, incorruptible and distinguished lawyer has never been questioned.

He complains that he, counsel, did not know what the petition of Mr. Bell, filed in the Surrogate's Court, contained. That he did not discover what his client and his client's sister, a most estimable lady, had sworn to, as disclosed by that document. If he failed to read the papers offered in evidence and to familiarize himself into their contents, he has but himself to criticise. It was his duty to have examined them.

Certainly, counsel for Mrs. Bell did not deceive him. When these papers were introduced in evidence, Mrs. Bell had the case. Her counsel was making out for her the charge of adultery against Mr. Bell, and also giving evidence to aid and assist the referee in determining the amount of alimony to be allowed.

The Pennsylvania decree was purely a matter of defense. It was pleaded as such. Mrs. Bell was not required to anticipate this defense by giving any evidence in avoidance of that decree, or to show it was without jurisdiction and void, until after the defendant himself had attempted to use it as a defense.

When this decree was introduced it appeared to have been an *exparte* proceeding, obtained on constructive service against

a person who never had been a resident of Pennsylvania. The evidence already introduced before the Referee showed that Mr. Bell had been prior to filing his libel in Pennsylvania a resident of Buffalo. There was no evidence offered that he had ever changed his residence, but, on the contrary, we had Mr. Bell's own sworn statement, and that of his sister, in a paper drawn and prepared by his own lawyer, that at the very time he was conducting his Pennsylvania proceedings he was actually, and in fact, a resident of the City of Buffalo, in the State of New York.

It was not necessary for Mrs. Bell to introduce any further testimony to warrant the Referee in finding that Mr. Bell's pretended residence in Pennsylvania was simply a pretense. Counsel for Mr. Bell has seen fit to make statements on that subject outside the record. This Court will not pay any attention to such representations. If there had been any attempt to bolster up this Pennsylvania decree, by showing a Pennsylvania residence, every one in the City of Buffalo knows how disastrously futile such an effort would have proved.

But being confronted with these sworn statements of Mr. Bell, of his most excellent and respectable sister, in a paper prepared by his own lawyer, who never suspected any change in domicile, how does the counsel propose to meet it? Was it by calling witnesses to show that Mr. Bell had in truth and in fact changed his residence? No! No offer of that kind was made. Whereas the burden of proof upon the party who asserts the change to establish it,

Depuy v. Wurtz, 53 *N. Y.*, 556–561.

Counsel did not propose to call any one but Mr. Bell himself. He simply offered to show by Mr. Bell that when he signed and swore to the paper he did not know that it contained a statement as to his residence.

That was the objection of counsel for Mrs. Bell to the evidence offered. First, that counsel ought not to be permitted to open his case after he had summed it up, and second, "*that under the provisions of the code, defendant would not be a competent witness.*" (Page 77.)

Counsel for Mr. Bell knew perfectly well that the objection raised was absolutely fatal to his offer.

The Referee could make but one ruling, and that was to refuse counsel the right to call Mr. Bell for any such purpose. He did rule accordingly. That there may be no misunderstanding as to the provisions of the section of the Code of Civil Procedure referred to, we quote it in full.

"Section 831. When husband and wife not competent witnesses. When competent.

"A husband or a wife is not competent to testify against the "other upon the trial of an action, or the hearing upon the "merits of a special proceeding founded upon an allegation of

"adultery, except to prove the marriage, or disprove the allega-
"tion of adultery. A husband or wife shall not be compelled,
"or, without consent of the other, if living, allowed, to disclose
"a confidential communication, made by one to the other, dur-
"ing marriage. In an action for criminal conversation, the
"plaintiff's wife is not a competent witness for the plaintiff,
"but she is a competent witness for the defendant as to any
"matter in controversy; except that she cannot, without the
"plaintiff's consent, disclose any confidential communication
"had or made between herself and the plaintiff."

Counsel for Mr. Bell did not ask permission to introduce any proof or evidence by any other witness, and the Referee could not possibly make any other finding on the evidence before him than he did.

The Referee in his opinion said: "The defendant claimed a "residence in Pennsylvania, but such residence could have "been but nominal, as he at the same time claimed to be a resi-"dent of this State in proceedings in a Surrogate's Court here. "No evidence was offered to show that the defendant actually "changed his domicile from this State to that of Pennsylvania." Page 10 of Record.

On appeal to the Appellate Division of the New York Supreme Court, the Court there said: "The evidence is ample to sustain "the finding of the Referee that the defendant in this action "was not a resident or citizen of Pennsylvania, but was taken "solely for the purpose of instituting and prosecuting his suit "for divorce." (Record, page 81.)

The evidence supported the finding, and the *United States Supreme Court must accept and cannot reverse the findings of fact of the Trial Court.*

St. Louis v. Rutz, 138 *U. S.*, 226.
Ruckle v. Burnham, 153 *U. S.*, 216.
Laing v. Rigney, 160 *U. S.*, 536.

Not only is this true, but the counsel for the opposite side has never asked a reversal of the judgment on the ground of the rejection of the offer either in the Appellate Division or in the Court of Appeals. His briefs submitted to those Courts show this statement to be true, but in addition he expressly stated in open Court he did not ask any reversal on the ground of any supposed error in the ruling by the Referee in rejecting his offer.

Counsel for the plaintiff in error intimates that Mr. Bell's *domicile* was in Pennsylvania, whereas his *residence* was in Buffalo, and that, therefore, while Mr. Bell, in fact, lived and resided in the City of Buffalo, he had acquired a *domicile* in Pennsylvania for the purposes of a divorce. In fact, he says, in his brief, he advised him to do it. The record does not disclose any such thing, but it appears that in counsel's mind that state-

ment meets the case, although we submit that counsel's own statement is absolutely fatal to his client's cause.

The word "*residence*," however, as used in the Code of Civil Procedure of the State of New York and in the Referee's decisions, simply means domicile.

Whatever meaning they may have in other States, or in other connections, the meaning of the word "*resident*" has been construed and defined by judicial decision in New York State.

The New York Court of Appeal defining this word says:

"*In legal phraseology residence is synonymous with inhabi-*
"*tance or domicile. And it is in that sense that the term resi-*
"*dent is used in the provisions of the Code referred to, and*
"*persons having that relation to this State are its citizens and*
"*residents.*"

DeMeli v. DeMeli, 120 *N. Y.*, 491.
Hunt v. Hunt, 72 *N. Y.*, 240.

The decree now under consideration is a New York decree, and the meaning of words and terms therein used must be determined by the accepted definition in that State, and it was just in that sense that the Referee used the term resident, when he found as matter of fact that Mr. Bell was not a *bona fide resident* of Pennsylvania.

A perusal of his opinion. He says: "*While domiciled here the*
"*defendant brought an action in a Court of Pennsylvania for*
"*a divorce from the plaintiff.*" "The defendant claimed a resi-
"dence in Pennsylvania, but such residence could have been but
"nominal, as he at the same time claimed to be a resident of
"this State in proceedings in a Surrogate's Court here. No evi-
"dence was offered to show that the defendant actually changed
"his domicile from this State to that of Pennsylvania."

Showing the Referee used the term *residence* and *domicile* interchangeably as defined in

De Meli v. De Meli, 120 *N. Y.*, 491.

THIRD.

Counsel for Mr. Bell attacks Mrs. Bell's residence or domicile. (See his brief, pages 35 and 36.)

Just why he sees fit to do this, I do not know. We have seen Mrs. Bell was forced to leave her husband's house; that she might have acquired a valid legal residence or domicile in Illinois, if she had chosen to have done so, no one can dispute. It was for her to elect whether she would change her legal resi-

dence or not. And if she saw fit to still treat and regard herself a resident of New York under the circumstances of the case it was her right and her privilege. She was not forced to surrender her New York domicile, and she never did.

The testimony is, that after the separation, she, Mrs. Bell, always claimed Buffalo as her home, and in legal documents she executed invariably described herself as a resident of Buffalo. (Pages 15 and 16.) She hoped for a reunited married life. Her letters to her husband were written to that end. She was urged to institute proceedings for divorce, and refused.

At a later day she returned to New York, where she has lived ever since to this day.

The Referee properly found she was a resident of the State of New York.

FOURTH.

Counsel for the plaintiff in error asserts that there is no finding of the Referee of any fraud in procuring the Pennsylvania judgment. (See page 34 of his points.)

Let us see. Mr. Bell asserted in his petition before the Pennsylvania Court that he was a resident of that State. The Referee finds he was not.

He based his action in that State on the allegation of desertion. The Referee finds facts showing the charge absolutely false. Mr. Bell is found guilty of adultery at and prior to the very time when he filed his libel for a divorce in Pennsylvania. Being guilty of this offense he had no standing by right in the Pennsylvania Courts.

Each and every one of these facts show a deliberate fraud on the Pennsylvania Courts, as well as upon Mrs. Bell and her rights. Mrs. Bell sues for a divorce, the defendant sets up his Pennsylvania decree. The Court finds facts not only showing an utter lack of jurisdiction in the Pennsylvania Court but fraud and imposition on it as well, and the New York Court holds the Pennsylvania judgment void. It grants the prayer of Mrs. Bell for divorce. It was required to do no more.

FIFTH.

An analysis of the various cases cited by the counsel for the plaintiff in error in his brief shows, that while they are not in entire harmony with the better considered decisions of other States yet can give little aid or assistance in upholding the position for which he contends in the case at bar.

We take the liberty of briefly summarizing most of these cases.

Gregory v. Gregory, 78 *Me.*, 187.

Was a case where a husband obtained a divorce in Illinois. The Illinois Court had found him a resident of that State, but his residence was disputed, and in an action in Maine, for dower, the Trial Court expressly submitted to the jury the question whether the husband was, or was not, at the time of taking his Illinois proceeding, such resident, declining to be bound by the recitals of the Illinois decree. On appeal it was held this ruling was entirely proper.

Harding v. Alden, 78 *Me.*, 187.

In this case the Court of Maine sustained a divorce obtained in Rhode Island by a wife against her husband, who had deserted her and committed adultery, although there was nothing but a substituted service on the husband.

The case, however, recognized the distinction made in Massachusetts, that "if a judgment be rendered in a State against a man not within that State, nor bound by its laws, nor amenable to its jurisdiction, and that judgment should be produced in any other State against the defendant, it would be entitled to no credit."

Bissell v. Briggs, 9 *Mass.*, 416.

Shaw v. Shaw, 98 *Mass.*, 158,

Simply construed a Massachusetts statute declaring that "no divorce can be granted for any cause occurring in any other State or country unless before such cause the parties had lived together as husband and wife in this State, and one of them lived in this State when the cause occurred," and held that a wife, under this statute, might file her bill against her husband, when they were married in Massachusetts, started for Colorado, but separated in Pennsylvania, owing to the husband's cruelty, and the wife returned to Massachusetts. The force and effect of a divorce of a sister State was not under consideration.

Hood v. Hood, 110 *Mass.*, 463,

Simply defined the force and effect of a previous Massachusetts judgment between the claimant and her husband, that case being

Hood v. Hood, 11 *Allen*, 196,

Where parties removed from Massachussets to Illinois, and resided there some years, and there the wife deserted her husband and returned to Massachusetts without cause. Her legal

domicile therefore continued in Illinois notwithstanding her desertion, and Illinois Courts, therefore, had jurisdiction of both parties, and it was held on that theory that an Illinois divorce obtained by the husband was valid in Massachusetts.

Burlen v. Shannon, 115 *Mass.*, 447.

The rule laid down in *Hood v. Hood*, 11 *Allen*, 196, was followed, and it was held that where a husband, whose wife is living apart from him without justifiable cause, removes from Massachusetts to another State and acquires a domicile there *without the purpose of obtaining a divorce*, and afterwards obtains a divorce in that State according to the laws thereof upon a substituted service, the divorce is valid, upon the theory of the identity of the domicile of the wife with that of the husband, unless she separates from him for justifiable cause.

Locker v. Gerald, 157 *Mass.*, 43.

The same rule is laid down as in the previous case of *Burlen v. Shannon*.

Ditson v. Ditson, 4 *R. I.*, 87.

Held that the Courts of Rhode Island had jurisdiction to grant divorce to a wife on her petition in its Courts, she being *a bona fide resident* of that State, although the marriage took place elsewhere, and the desertion took place in another State.

At the same time the Court said :

"It is a well-settled principle of *general law* upon this subject, that the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offense may have occurred, if neither of the parties has an actual *bona fide* domicile within its territory."

Tolen v. Tolen, 2 *Black*, *fol.* 407.

Parties were married in Kentucky. The husband deserted his wife and lived in adultery with another woman. The wife removed to Indiana and filed her bill for divorce in that State. It was held the Court had jurisdiction although the husband was a non-resident. The same Court, however, says :

"In the States of New York and Massachusetts it has been "decided, that where one or both of the parties remove into "another State for the purpose of procuring a divorce contrary "to the laws of their own State, without absolute change of "domicile, and the Court pronouncing such decree has no juris-"diction, having been imposed on by fraud and collusion. "These decisions, we think, are good law."

Thurston v. Thurston, 58 *Minn.*, 279.

A husband left his wife in Minnesota and went to Washington, where he became an actual, *bona fide resident*. She then filed a bill for divorce and was granted a decree, although he had not in fact lived in that State the statutory time required before filing his bill.

The wife filed her bill for decree against him in Minnesota, but the Minnesota Court held that inasmuch as the husband acquired a *bona fide* residence in Minnesota the decree was valid so far as the marriage status was concerned, that the marriage was dissolved, but that nevertheless the wife might maintain and recover alimony from her husband.

Thomas v. King, 95 *Tenn.*, 64.

A divorce granted in Illinois upon a substituted service was sustained on a collateral proceeding, it appearing to the satisfaction of the Tennesee Court, that the petitioner in the Illinois action was in fact a *bona fide resident* of Illinois.

The case fully sustains the doctrine that the question, whether a party was a *bona fide resident* of a State so as to give it jurisdiction, is a subject of inquiry when a decree obtained by him is set up as a defense or bar to a proceeding.

The case does not, however, follow the rule laid down in New York, Massachusetts or other States as to the effect of a judgment of divorce procured on a substituted service.

Rodgers v. Rodgers, 56 *Kans.*, 483.

Husband left his wife, went to West Virginia and there obtained a divorce from her on ground of alleged desertion. In an action in Kansas by the wife against the husband for divorce, the Court held the West Virginia decree valid, but at the same time also held that she might maintain an action for alimony, and the custody of children, etc.

Gould v. Crow, 57 *Mo.*, 200.

Was an action for recovery of dower in lands in Missouri.

The husband had obtained an Indiana divorce from his wife on the ground of her desertion of him in the State of Indiana. The record so showed, but the Trial Court excluded the record, as there had been no personal service on the wife. The Missouri Court held this error, the record having shown that attorneys appeared for the wife in the Indiana proceeding.

The Court, however, said :

"Of course, if Jeffries went to Indiana expressly to obtain "the divorce, that would render it fraudulent, and void as to "the wife, but that question is not before us."

Van Orsdal v. Van Orsdal, 67 *Iowa*, 36.

Iowa Court recognized as valid a Nebraska divorce obtained upon substituted service, where it appeared the parties, although married in Iowa, went to Nebraska to live, the wife subsequently moving to Iowa. It will be noted that there was nothing in this case to show that the separation was for justifiable cause, and for all that appears the domicile of the husband was the legal domicile of the wife.

Re James, 99 *Cal.*, 374.

The question was as to the validity of a Missouri divorce obtained by a husband against his wife, who remained in New York, and where there was only a substituted service, and it was held such a divorce was valid.

The Court, however, said, "We agree with the appellant that it is competent to collaterally impeach the record of a judgment rendered in another State by extrensic evidence, showing that the facts necessary to give the Court pronouncing it jurisdiction to proceed did not exist, and this is true although the record sought to be impeached may recite the existence of such jurisdictional facts."

In *Rigney v. Rigney*, 127 *N. Y.*, reversed by the United States Supreme Court under title of,

Laing v. Rigney, 160 *U. S.*, 531.

It appeared that Rigney had his legal residence in New Jersey but actually lived in New York. His wife resided in New Jersey and began action for a divorce against him in New Jersey on the ground of adultery. Rigney appeared in the action and filed an answer to the bill denying the charges of adultery. Subsequently, his wife filed a supplemental bill charging adultery by Rigney at times subsequent to the filing of the original bill. An order was made directing defendant to plead to the supplemental bill and directing service of the supplemental bill and order on him personally, which service was made on him personally in New York City. Rigney did not answer this supplemental bill whereupon the New Jersey Court proceeded to take proof and granted the divorce as prayed for with an allowance for costs and alimony.

In January, 1888, Rigney appeared by his solicitor and filed his answer to the original bill and applied for and obtained from the Chancellor an amendment of the decree of June 11, 1887, reciting in substance that the decree of divorce was granted for the adulteries charged in the supplemental bill. This action was subsequently brought in New York to enforce the provisions of the New Jersey decree for the payment of alimony and costs.

The defendant Rigney in his answer in that action claimed that the New Jersey Court never acquired jurisdiction over him to make any personal decree against him on the supplemental bill, on the alleged ground that jurisdiction could not be acquired without service of a new subpœna in New Jersey under the law and practice of New Jersey, and upon the trial called the Clerk of the New Jersey Court as an expert to show that the issuing and service of such supplemental subpœna was necessary, although he admitted on his cross-examination that there was no statute of New Jersey in terms requiring the issuing of a subpœna on any supplemental bill, nor was he able to specify any New Jersey statute requiring such process on an supplemental bill.

Notwithstanding, the Trial Court of New York held that under the New Jersey law jurisdiction could not be acquired without service of a new subpœna, and that such service was "an indispensable prerequisite to the rendition of a personal judgment," and therefore dismissed the action brought to enforce the judgment.

Upon the action being carried to the U. S. Supreme Court on a writ of error it was insisted that this finding as to the practice in New Jersey was a finding of fact which the Supreme Court would not review. But the Supreme Court held it was rather a question of law than one of fact, saying:

"It is well settled that exceptions to alleged findings of facts because unsupported by evidence present questions of law reviewable in Courts of error." (540.)

And as the only expert testified that the rules and regulations of the New Jersey Chancery Court were to be found in the Statutes, it was questionable whether his opinion upon the question as to whether the New Jersey Court acquired jurisdiction was competent evidence in the case (541), and that in the absence of statutory direction or reported decision, the Supreme Court was justified in concluding and finding the law to be as declared in the very case in hand when the Chancellor entered final decree.

The opinion of the Chancellor differed from that of the witness, and "his judgment was that, under the laws and practice of the State of New Jersey, the defendant was in his Court subject to its jurisdiction and bound by its decree." (544.)

The Court cites cases showing that it proceeded upon the theory and assumption that the New Jersey Court of Chancery acquired jurisdiction by the appearance of Rigney in the action, and that jurisdiction having attached if any error was committed it was an error in procedure and practice not going to the jurisdiction, which error could only be corrected by appeal in the action and the judgment could not be attached collaterally for such error.

It assumes if jurisdiction were wanting that then the judgment would be void.

The case, too, is in entire conformity with the rule which prevails that this Court will not review findings of fact. It simply

said that whether the New Jersey Court obtained jurisdiction was on the case presented, one of law and not one of fact.

Maynard v. Hill, 125 *U. S.*, 190.

The Legislature of the Territory of Oregon by statute dissolved the bonds of matrimony between a husband and wife. The husband was at that time a resident of the Territory. The wife was left by the husband in Ohio when he went to Oregon, promising to send for her to come to him.

The question as to the validity of this Legislature divorce arose upon a claim to certain lands located in a part of the original territory of Oregon, but which afterwards became a part of Washington Territory. It was held that the legislature divorce was valid as legislature divorces had been granted by parliament and other States for many years. This was upon a divided Court. The force and effect of this decree should not be enlarged by drawing from it any conclusions or deductions not strictly within the letter of the decision. It is at best a border case.

In the first place it is to be noted that Maynard, the husband, was a *bona fide* resident of Oregon, and his wife, whom he left in Ohio, upon a promise to send for her, was constructively also a resident of Oregon, as there had been no separation, and the domicile of the wife is presumed to follow that of the husband, as laid down in *Hunt v. Hunt*, 72 *N. Y.*, and in *Sewell v. Sewell*, 122 *Mass.*, 156. Therefore, when the territorial legislature of Oregon passed the statute divorcing Maynard it simply affected the marriage status of its own citizens and not those of the status of citizens of other States.

Consequently, the question was not presented how far other States would be bound to respect the Oregon statute of divorce had the wife in fact been a *bona fide* resident of a State other than Oregon.

Again, the question before the Court was as to the effect of the Oregon statute within the territorial limits of Oregon itself, not as to how far sister States were bound to respect the Oregon divorce.

It may also be said in addition that the question presented was one of legislative power, acting on the rights and status of its own citizens, not one of the jurisdiction of Courts to summon and determine the rights of citizens of other States, where due process of law is required.

Maynard v. Hill is a case *sui generis*, and can form no precedent for the questions involved in the case now under consideration.

SEVENTH.

The marriage status is not a *res* within the ordinary meaning of that term.

People v. Baker, 76 *N. Y.*, 78–85.
Jones v. Jones, 108 *N. Y.*, 415–424.
Williams v. Williams, 130 *N. Y.*, 199.

Read what Mr. Chief Justice Folger said on this subject in the case of *People v. Baker*. We quote: "It is said that a "judicial proceeding to touch the matrimonial relation of a "citizen of a State, whether the other party to that relation is "or is not also a citizen, is a proceeding *in rem*, or, as it is more "gingerly put, *quasi in rem*. But it was never heard that the "Courts of one State can affect in another State the *rem* there, "not subjected to this process; and over the person of the "owner of which no jurisdiction has been got. Now, if the "matrimonial relation of the one party is the *res* in one State, "is not the matrimonial relation of the other a *res* in another "State? Take the case of a trust, the subject of which is "lands in several States, the trustees all living in one State. "Doubtless the Courts of a State in which the trustees did not "live and never went, but in which were some of the trust "lands, could proceed *in rem* and render a judgment without "personal service of process, which would determine there the "validity of the trust and affect the possession and title of the "lands within the jurisdiction of those Courts; but, it would "be contended, that the judgment would operate upon the "trustees or upon the lands, in other States, so as to affect the "title, or the possession, in those States. It would operate only "on the *rem*, upon which the process of those Courts could "lay hold. And why is not the matrimonial relation of a citi- "zen of New York as it exists in that State, if it is a *res*, as "much exempt from the effect of such a judgment as lands in "that State, and the trusts under which they may be held?"

CHAS. B. WHEELER,

Counsel for Defendant in Error, Buffalo, N. Y.

UNITED STATES SUPREME COURT.

No. 39, O. T. 1900. No. 265, O. T. 1899.

FREDERICK A. BELL, PLAINTIFF IN ERROR,

against

MARY G. BELL, DEFENDANT IN ERROR.

POINTS FOR DEFENDANT IN ERROR IN SUPPORT OF MOTION THAT UPON DECISION OF THIS CASE JUDGMENT MAY BE ENTERED AS OF DATE OF SUBMISSION OF CASE TO COURT ON ARGUMENT.

STATEMENT.

This case came before this Court upon a writ of error directed to the Supreme Court of the State of New York to review a decree or judgment of divorce granted to Mary G. Bell against her husband, Frederick A. Bell.

The case was argued and finally submitted to this Court for decision on the 26th day of April, 1900.

After submission, and while the Court still had the case under advisement, and on the 20th day of May, 1900, the plaintiff in error, Frederick A. Bell, died. The counsel for Mrs. Bell has, by affidavit, made suggestion of the death of Mr. Bell and now moves this Court that upon the decision of the case the Court direct judgment to be entered as of the 26th day of April, 1900, when same was finally taken under advisement. In the supplemental affidavit filed by the counsel for Mrs. Bell, as well as by the return and record before the Court, it appears that in and by the decree of divorce which is now under review, Mr. Bell was adjudged to pay to Mrs. Bell "the sum of three thousand "dollars ($3,000) per annum during the natural life of the said "Mary G. Bell, as and for her support and maintenance, such "payments to begin from the 22d day of December, 1894, and "to be paid in quarterly instalments of seven hundred and "fifty dollars ($750) each at the end of every three months."

(See printed return and record, pages 13 and 14, and also Mr. Wheeler's affidavit made on this motion.)

The judgments below also provided for the payment of three bills of costs, one for $425.94, one for $99.85 and a third for $117.86. (See record and Mr. Wheeler's affidavit.)

It is further shown that no part of the alimony decreed, and no part of the several judgments for costs, have been paid, but the whole remains due, amounting at this date to about the sum of twenty thousand dollars ($20,000).

The payment of these amounts is secured by an undertaking given upon the granting of the writ in this case, which appears in the printed record at pages 88 and 89.

The defendant in error insists that the judgment sought to be reviewed should be affirmed, and that the judgment of affirmance should be entered as of the 26th of April, 1900, when said cause was finally submitted to the Court.

The death of Mr. Bell has abated none of the rights of Mrs. Bell determined by the judgment in her favor.

If the marriage relation of Mr. and Mrs. Bell were alone involved, then as the death of Mr. Bell has terminated that relation, independent of whatever decree this Court might make, it might well follow that this Court would not feel called on under such circumstances to make any disposition of the questions involved in this case.

In addition to the question of the marriage relation there, however, are involved large and valuable property rights amounting at this date to about the sum of twenty thousand dollars ($20,000). If the Pennsylvania divorce, obtained by Mr. Bell, was a bar and defense to this action brought by Mrs. Bell, in the Courts of New York, then the award of alimony and costs was error. If on the other hand, the Pennsylvania divorce was granted without jurisdiction, and therefore void, the judgment for costs and alimony was right.

In matrimonial actions where there has been no trial, the death of either party, as a rule, operates to abate the action.

If, however, a decree has been entered, then no abatement follows.

The theory of abatement after trial and judgment is well expressed in the case of

Carr vs. Rischer, 119 *N. Y.*, 124,

where it was claimed the death of a party sued in an action to recover a penalty, operated to abate an appeal taken after the entry of a judgment. The Court held to the contrary, and said, "The "original wrong was merged in the judgment, and then became "property with all the attributes of a judgment in an action *ex "contractu*. Since the rendition of the judgment the contro- "versy between the parties has been over the judgment, not "over the original wrong, after the reversal of the judgment "there could never be a new trial, because there was no one liv- "ing legally bound to respond for the wrong or who could "legally ask for its redress. The reversal of the judgment did "not for every purpose strike it out of existence as if it had "never had being. It still had a potential existence. The re- "versal was not final. The law gave opportunity by appeal for "its restoration, and this the controversy over the judgment as "property, could be continued. The plaintiff by the appeal "seeks to fasten upon the representatives of the deceased de- "fendant, not responsibility for the original wrong, but, for the "judgment, and she seeks not to recover damages for the wrong, "but to enforce and realize upon the judgment as an asset of "the estate which she represents."

To the same general effect is the case of

Blake vs. Griswold, 104 *N. Y.*, 613.

The rule applies to actions for divorce, and it has been held in a number of well considered cases that notwithstanding the death of a party in an action for divorce, an appeal from the judgment may still be prosecuted by the representatives or successors of the defeated party where the decree of divorce affects property rights.

Danforth vs. Danforth, 111 *Ill.*, 236.
Mead vs. Mead, 1 *Mo. App.*, 247.
Downer vs. Howard, 44 *Wis.*, 82.
Thomas vs. Thomas, 57 *Md.*, 506.
Shafer vs. Shafer, 30 *Mich.*, 163.
Wren vs. Moss, 2 *Gilman* (7 *Mich.*), 72.
Israel vs. Arthur, 6 *Colorado*, 85.

If the legal representatives of a defeated party have the right to prosecute an appeal from a decree in an action for divorce,

because the decree affects property rights, then certainly the converse of the proposition must be true, and the successful party has the right to insist on an affirmance notwithstanding the death of the appellant.

The Court will and should, under such circumstances, take great care to protect the interests and property rights of the successful and injured party. It has done so in the past.

In the case of

Seibley vs. Ingram, 105 *Mich.*, 584,

an absolute divorce was granted the wife, but by the decree the question of alimony was reserved for the further order of the Court. The husband died after the entry of the decree, but the Court, notwithstanding his death, took up the matter and by a supplemental decree upon the foot of the original judgment, provided for permanent alimony to be paid out of the decedent's estate. Holding the action had not abated and that the death of the party did not oust the Court of jurisdiction.

In

Thomas vs. Thomas, 57 *Md.*, 506,

the Court held that while the death of a party to an appeal from a decree of divorce abated the appeal so far as it related to the marriage status, yet that the appeal might be prosecuted for the purpose of determining property rights incident thereto.

In

Danforth vs. Danforth, 111 *Ill.*, 236,

the husband filed his bill for divorce against his wife, and procured a decree in his favor. The wife then entered a motion to set the decree aside for fraud in procuring it. The motion was overruled. She appealed from the order and decree. The appeal was argued and submitted and pending a decision the husband died. It was held his death did not abate the action or appeal, and the Court rendered a judgment in favor of the wife reversing the judgment and directing its entry *nunc pro tunc* as of the date of the submission of the case.

To the same effect is the case of

Mead vs. Mead, 1 *Mo. App.*, 247,

where the defendant, against whom a judgment of divorce was granted, appealed, and died pending a decision, but after argument and submission of the case, and judgment *nunc pro tunc* was ordered.

The judgment for alimony in favor of Mrs. Bell must stand. The death of Mr. Bell could not in any way impair the force and effect of that judgment, if it be free from attack on other grounds.

Carr vs. Rischer, 119 *N. Y.*, 124.
Blake vs. Griswold, 104 *N. Y.*, 613.

In addition to the question of alimony is also involved the question of attorney's lien on the recovery for services rendered.

The question whether a cause of action survives or abates is not a question of procedure, but of right, and when the cause of action does not arise under a law of the United States, depends on the law of the State in which the suit is brought.

Martin vs. Baltimore & Ohio R. R. Co., 151 *U. S.*, 674.
Baltimore & Ohio R. R. Co., 173 *U. S.*, 226.

The right of Mrs. Bell to dower in the real estate of Mr. Bell is also involved, because under the law of the State of New York a woman who had obtained a decree for a divorce *a vinculo matrimonii* for the adultery of her husband is, notwithstanding such divorce, entitled after his death to dower in his estate.

Wait vs. Wait, 4 *Comstock*, 95.
Van Voorhis vs. Brintnall, 23 *Hun*, 260.
Forrest vs. Forrest, 3 *Abb. Pr.*, 144.

It would be a great denial of justice should Mrs. Bell either by the action or inaction of this Court be defeated in the property rights secured by the judgment in her favor.

Therefore this Court should affirm the judgments brought here for review, and in doing so grant this motion.

Where cases have been once argued and submitted to a Court for its disposition, it is the proper practice in the event of the death of a party while the case is under advisement, to enter judgment as of the date of submission.

Mitchell vs. Mitchell, 103 *U. S.*, 62.
Borer vs. Chapman, 119 *U. S.*, 596.
Danforth vs. Danforth, 111 *Ills.*, 236.
Mead vs. Mead, 1 *Mo. App.*, 247.

This has been the uniform practice not only in this Court, but in the Courts of the various States. (See the numerous cases cited in note to the reported case of *Mitchel vs. Overman*, 103 *U. S.*, 62.)

The delay of Court in rendering decision should not prejudice a party's rights.

Counsel for the defendant in error, therefor, respectfully submits that the motion should be granted and judgment on decision of the case be entered as of April 26th, 1900.

The great and far-reaching constitutional question involved also calls for the decision of this case.

CHAS. B. WHEELER,
Counsel for defendant in error,
No. 117 Erie County Saving Bank,
Buffalo, N. Y.